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Religious Liberty after Gonzales: A Look at State RFRAs

Christopher C. Lund
Wayne State University

RELIGIOUS LIBERTY AFTER *GONZALES*: A LOOK AT STATE RFRAS

CHRISTOPHER C. LUND†

This symposium is organized around the twentieth anniversary of the Supreme Court's decision in *Employment Division v. Smith*.[1] *Smith*, as everyone knows, dramatically narrowed the scope of the Free Exercise Clause. But *Smith* also spawned a chain of events highly protective of religious liberty. It led to the passage of the Religious Freedom Restoration Act (RFRA),[2] the Religious Land Use and Institutionalized Persons Act (RLUIPA),[3] state-law versions of the Religious Freedom Restoration Act (state RFRAs),[4] as well as a reexamination of some state-level constitutional provisions relating to religious liberty.[5] These reactions have tempered *Smith*. Indeed, some might wonder about the net effect of it all. Four years ago, the Supreme Court decided *Gonzales v. O Centro Espírita Beneficente União do Vegetal*.[6] *Gonzales* gave RFRA such a vigorous interpretation that religious believers seemed almost better off now than before *Smith*, at least with respect to federal law. And with regard to state law, sixteen states now have state RFRAs—state-law analogues of the federal Religious

† Assistant Professor of Law, Wayne State University Law School. I am grateful to the *South Dakota Law Review* for inviting me to participate in this symposium, and want to thank Thomas Berg, Mary Jean Dolan, Mark Kende, and Rob Luther for helpful comments on earlier drafts. Many thanks also must go to Rachel Reed, who provided excellent research assistance on this piece.

1. 494 U.S. 872 (1990).

2. *See* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb (2006)).

3. *See* Religious Land Use and Institutionalized Persons Act, Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified at 42 U.S.C. §§ 2000cc (2000)).

4. *See infra* note 67 (providing citations to state RFRAs).

5. *See infra* note 170 (providing citations to the literature regarding such constitutional provisions).

6. 546 U.S. 418 (2006).

Freedom Restoration Act, usually passed by state legislatures.[7] A number of others have state constitutional provisions interpreted to be more protective than *Smith*.[8] All told, that is about thirty states—well more than half—going beyond *Smith*.[9] Maybe then we can now all breathe easier. Maybe all those commentators quoting Mark Twain are right; maybe religious liberty has survived *Smith* relatively unscathed.[10]

But this optimism should be tempered. *Gonzales* matters. But of the laws that burden religious exercise, only a tiny fraction of them are federal ones. Most religious liberty disputes arise over state and local laws, where *Gonzales* does not apply. This limit on *Gonzales*'s reach cannot be overstated. Being exempt from federal laws hardly matters if you can still be prosecuted for the same act under state or local ones. So for *Gonzales* to really mean anything, state and local governments must also choose to protect religious observance within their borders.

This is where things become more troublesome. While a bird's eye view of things may seem positive, a closer look reveals some disturbing trends. There is reason to doubt whether these state-level religious liberty provisions truly provide meaningful protections for religious believers. Sixteen states may have state RFRAs, but claims under them are exceedingly rare.[11] Lexis and Westlaw searches show that four states have never decided even a single case under their state RFRAs. Six other states have decided only one or two cases apiece. That is more than half of state RFRAs right there. And when state RFRA claims have been brought, they rarely win.[12] In most jurisdictions, plaintiffs have not won a single state RFRA case litigated to judgment. To be sure, some states have seen significant state RFRA litigation and there have been some very important victories.[13] But in many states, state RFRAs seem to exist almost entirely on the books.

Separate and aside from the numbers, the reasoning of the decided state

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7. *See infra* note 67.

8. *See infra* note 170.

9. *See* Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 212 (2004) ("In all, more than half the states appear to have adopted some version of the *Sherbert-Yoder* test."); WILLIAM W. BASSETT, W. COLE DURHAM & ROBERT T. SMITH, 1 RELIGIOUS ORGANIZATIONS AND THE LAW § 2:55, at 2-233 (2009) ("[W]hile the coverage remains a bit lumpy and uneven, strict scrutiny review of free exercise claims is still the overwhelmingly dominant rule throughout the United States.").

10. *See* Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise: Smith, Lukumi and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 850 (2001) ("The Free Exercise Clause is the Mark Twain of Constitutional Law, because the recent report of its death 'was an exaggeration.'"); Daniel A. Crane, *Beyond RFRA: Free Exercise of Religion Comes of Age in the State Courts*, 10 ST. THOMAS L. REV. 235, 278 (1998) ("Like the reports of Mark Twain's death overseas, the reports of religious liberty's demise have been exaggerated."); DANIEL A. FARBER, THE FIRST AMENDMENT 257 (1998) ("[R]eports of the death of the Free Exercise Clause have been somewhat exaggerated.").

11. *See infra* Part III.A.

12. *See infra* Part III.B.

13. *See infra* note 98 (providing citations).

RFRA cases also creates cause for concern.[14] Courts grossly misunderstand, and improperly heighten, the threshold requirement of a substantial burden on religious exercise. Courts regularly equate the strict scrutiny imposed by state RFRAs with rational basis review, sometimes quite explicitly—as if they lack the most basic understanding of what these state RFRAs are trying to do. If *Gonzales* demonstrated the upsides that can result from legislative codification of religious liberty, some of these state RFRAs now demonstrate the downsides.

Pinpointing the source of this problem is difficult. Part of it, I suspect, lies with the attorneys. Attorneys who bring these cases are often not specialists. They have no reason to know about these obscure provisions of state law we call state RFRAs. So they quite naturally fail to plead state RFRA claims in the complaints they file, even where such claims would change the standard of review.[15] And when state RFRA claims are brought, attorneys naturally bring them in federal courts—even though federal courts, for technical reasons, often lack jurisdiction to hear them or power to order compliance with them.[16] Yet the problem runs deeper than just the attorneys. Judges who hear these cases sometimes do not know what to do with state RFRAs either. Some of it is judicial resistance to the values that state RFRAs embody.[17] More of it probably is judicial confusion. In any event though, the end result is the same. In most places, state RFRAs simply have not translated into a dependable source of protection for religious liberty at the state level.

All this can be hard to understand. Tremendous resources have been spent on enacting state RFRAs.[18] Great hurdles had to be overcome.[19] Prominent scholars poured themselves into debates over these state RFRAs—over their constitutionality,[20] their drafting,[21] and what they should mean in various contexts: the workplace,[22] schools,[23] land use,[24] speech,[25] prisons,[26] and civil

14. *See infra* Part III.D.

15. *See infra* note 92 and accompanying text.

16. *See infra* Part III.C (discussing the doctrines of supplemental jurisdiction and state sovereign immunity that frequently prevent federal courts from hearing the merits of state RFRA claims).

17. *See, e.g.*, Potter v. District of Columbia, Nos. 01-1189 & 05-1792, 2007 WL 2892685, at *1 (D.D.C. Sept. 28, 2007) ("Justice Holmes once wrote that it brought him the greatest pleasure to enforce those laws which he believed to be as bad as possible, because he thereby marked the boundary between his beliefs and the law. His faith was never tested by the Religious Freedom Restoration Act of 1993[.]") (citations and quotations omitted).

18. *See infra* notes 63 and accompanying text.

19. *See infra* notes 62 and accompanying text.

20. *See, e.g.*, Erwin Chemerinsky, *Do State Religious Freedom Restoration Acts Violate the Establishment Clause or Separation of Powers?*, 32 U.C. DAVIS L. REV. 645 (1999); Thomas C. Berg, *The Constitutional Future of Religious Freedom Legislation*, 20 U. ARK. LITTLE ROCK L. REV. 715 (1998); Mary Jean Dolan, *The Constitutional Flaws in the New Illinois Religious Freedom Restoration Act: Why RFRAs Don't Work*, 31 LOY. U. CHI. L.J. 153 (2000); Mark J. Austin, *Holier Than Thou: Attacking the Constitutionality of Religious Freedom Restoration Legislation*, 33 LOY. L.A. L. REV. 1183 (2000).

21. Daniel O. Conkle, *Free Exercise, Federalism, and the States as Laboratories*, 21 CARDOZO L. REV. 493, 496-98 (1999); Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1503-04 (1999).

22. *See, e.g.*, Vikram David Amar, *State RFRAs and the Workplace*, 32 U.C. DAVIS L. REV. 513 (1999).

rights laws.[27] Whole pieces have been devoted to the effect of a single state's RFRA.[28] The *U.C. Davis Law Review* had a symposium with about a dozen papers on the state RFRA trend.[29] We discussed the changes that the state RFRAs would create; we disputed whether those changes would be good or bad. But a decade later, it is hard to see any real changes at all. In most states, state RFRAs have almost negligible effects. So far, they are the dog that has not barked.[30]

This symposium focuses on *Smith* and the things to which it has led. But the entire story has not been written yet, and we do not know how it will end. *Smith* might yet be for the good. *Gonzales* has taught us that courts will go out on a limb to protect religious liberty much more often when they can trace their power back to some legislative authorization, however general. But at the state level, the story looks very different. However valuable it is to have religious liberty enshrined as an ideal on the books, it is far more important to have meaningful protections that can be successfully invoked by plaintiffs in the real world. These state RFRAs, for the most part, are simply not providing that.

I. THE PRELUDE TO STATE RFRAS

Twenty years ago, the Supreme Court decided *Employment Division v.*

23. *See, e.g.*, Thomas C. Berg, *State Religious Freedom Statutes in Private and Public Education*, 32 U.C. DAVIS L. REV. 531 (1999).

24. *See, e.g.*, Von G. Keetch & Matthew K. Richards, *The Need for Legislation to Enshrine Free Exercise in the Land Use Context*, 32 U.C. DAVIS L. REV. 725 (1999); Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755 (1999); Daniel N. Price, Note, *The Constitutional Standard for Zoning Cases Under the Texas Religious Freedom Restoration Act*, 6 TEX. F. ON C.L. & C.R. 365 (2002).

25. *See, e.g.*, Alan E. Brownstein, *State RFRA Statutes and Freedom of Speech*, 32 U.C. DAVIS L. REV. 605 (1999).

26. *See, e.g.*, Lee Boothby & Nicholas P. Miller, *Prisoner Claims for Religious Freedom and State RFRAs*, 32 U.C. DAVIS L. REV. 573 (1999).

27. *See, e.g.*, Robert M. O'Neil, *Religious Freedom and Nondiscrimination: State RFRA Laws Versus Civil Rights*, 32 U.C. DAVIS L. REV. 785 (1999); Cheryl Rubenstein, Note, *Legislating Religious Liberty Locally: The Possibility of Compelling Conflicts*, 19 REV. LITIG. 289 (2000).

28. *See, e.g.*, Thomas C. Berg & Frank Myers, *The Alabama Religious Freedom Amendment: An Interpretive Guide*, 31 CUMB. L. REV. 47 (2000-2001); Thomas C. Berg & Frank Myers, *The Alabama Religious Freedom Amendment: A Lawyer's Guide*, 60 ALA. LAW. 396 (1999); Mary Jean Dolan, *The Constitutional Flaws in the New Illinois Religious Freedom Restoration Act: Why RFRAs Don't Work*, 31 LOY. U. CHI. L.J. 153 (2000); Lisle A. Stalter, *A Practical Overview of Illinois' Religious Freedom Restoration Act*, 88 ILL. B.J. 96 (2000); James A. Hanson, *Missouri's Religious Freedom Restoration Act: A New Approach to the Cause of Conscience*, 69 MO. L. REV. 853 (2004); Victoria J. Avalon, *The Lazarus Effect: Could Florida's Religious Freedom Restoration Act Resurrect Ecclesiastical Sanctuary?*, 30 STETSON L. REV. 663 (2000); David S. Stolle, *A Holy Mess: School Prayer, the Religious Freedom Restoration Act of Texas, and the First Amendment*, 32 ST. MARY'S L.J. 153 (2000).

29. *See* sources cited *supra* in notes 20-27; *see also* W. Cole Durham, Jr., *State RFRAs and the Scope of Free Exercise Protection*, 32 U.C. DAVIS L. REV. 665 (1999); Bettina Krause, *Coalition Building and Legislative Realities*, 32 U.C. DAVIS L. REV. 811 (1999); Alan Reinach, *Why We Need State RFRA Bills: A Panel Discussion*, 32 U.C. DAVIS L. REV. 823 (1999).

30. *See* ARTHUR CONAN DOYLE, *Silver Blaze*, in 1 THE COMPLETE SHERLOCK HOLMES 413-15 (Jeffrey Broesche ed. 2003) ("[Inspector Gregory:] 'Is there any other point to which you wish to draw my attention?' [Holmes:] 'To the curious incident of the dog in the night-time.' [Gregory:] 'The dog did nothing in the night-time.' [Holmes:] 'That was the curious incident . . . Obviously the midnight visitor was someone the dog knew well.').

Smith[31]—the case around which this symposium has been organized. *Smith* cast aside the strict scrutiny model for the Free Exercise Clause, which had been built up in cases like *Sherbert v. Verner*[32] and *Wisconsin v. Yoder*.[33] Under that old model, burdens on religious liberty had to be justified—the government had to show the regulation in question was backed by a compelling governmental interest and pursued by the least restrictive means.[34]

Smith changed all that. It said that burdens on religion no longer needed any justification, as long as the laws in question were neutral and generally applicable.[35] Burdens on religious exercise now need not be supported by any evidence or logic. They do not need to be reasonable or even rational. They only need to be neutral and generally applicable. Take one recent case where a Jehovah's Witness was selected to be Director of Finance for a small town.[36] The quarterly budget meetings were held on Saturdays. Religiously obligated not to work on Saturday, her Sabbath, she suggested a slew of alternatives. The Saturday meetings could be held on other days, which had sometimes been done in the past. She could appoint someone else to attend the meetings in her place, as also had been done in the past. Surely, she said, there must be some reasonable accommodation out there where she could keep her job but miss these Saturday meetings. After all, they only lasted a few hours and happened just four times a year.[37] But the district court explained that she had gotten *Smith* all wrong: "For the employment requirement to be neutral and generally applicable, Defendants need not make, or even try to make, a reasonable accommodation for Plaintiff's religious practice."[38] The district judge seemed to think this was a good thing. But whether he is right about that or not, his sentence does accurately depict the *Smith* rule. After *Smith*, the government has the right to treat religious people unreasonably.

Now *Smith* did not completely define the meaning of neutrality or general

31. 494 U.S. 872 (1990).

32. 374 U.S. 398 (1963).

33. 406 U.S. 205 (1972).

34. *See* Thomas C. Berg, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United States*, 19 EMORY INT'L L. REV. 1277, 1296 (2005) (explaining how "[t]he compelling interest standard . . . was drawn from *Sherbert* and *Yoder*"); *see also* Laycock, *supra* note 9, at 201-202 & nn. 272-278.

35. *Smith*, 494 U.S. at 879 ("Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).") (citations and quotations omitted); *id.* at 886 n.3 ("Our conclusion that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest is the only approach compatible with these precedents.").

36. *See* Filinovich v. Claar, No. 04-7189, 2006 WL 1994580 (N.D. Ill. July 14, 2006).

37. For all these allegations—which were uncontradicted and had to be taken as true anyway given that the defendant was seeking judgment on the pleadings—see Plaintiff's Memorandum of Law in Support of her Motion for Partial Summary Judgment Against Defendant Village of Bolingbrook, at 2-5, *in* Filinovich v. Claar, No. 04-7189, 2006 WL 1994580 (N.D. Ill. July 14, 2006), *available at* 2005 WL 2241363.

38. *See Filinovich*, 2006 WL 1994580, at *5.

applicability—people still fiercely debate that.[39] But *Smith* makes clear that judicially mandated religious exceptions are now themselves exceptional. To the extent secular law clashes with religious obligation, religious obligation generally loses. The narrowest reading of *Smith*, though a common one, is that it forbids only intentional discrimination.[40] But a ban solely on intentional discrimination quickly becomes a recipe for neglect. Religious groups cannot really allege intentional discrimination if the government simply ignores them. But their claim looks better if the government first considers the negative impact its action will have on religious communities, but then continues on that course of action anyway. Neglect is the logical result of those incentives—after *Smith*, the best way of insulating a decision from judicial scrutiny under the Free Exercise Clause is by pretending not to see the impact it has on religious groups. *Smith* does not just allow that neglect; *Smith* rewards it.[41]

But with each passing year, *Smith* becomes more and more entrenched. With each Supreme Court case that addresses the Free Exercise Clause but fails to reconsider it and with each lower court opinion that relies on it, *Smith* becomes more interwoven into our constitutional fabric. Even in semester-long classes on religious liberty, *Sherbert* and *Yoder* are now covered quickly; *Smith* receives all the attention. *Smith* was heavily criticized for overturning long-standing precedent, like *Sherbert* and *Yoder*. But *Smith* itself is now almost as old as *Sherbert* was when it was overruled, and it is now older than *Yoder*.[42] The same considerations of *stare decisis* that cut against *Smith* now counsel in favor of it. We may be stuck with *Smith*; we should probably get used to it.

But *Smith*, of course, was not the end of the story. It was in fact the beginning of a long series of events. Three years after *Smith* and in direct response to it, Congress passed RFRA, the Religious Freedom Restoration Act.[43] RFRA brought back the same sort of strict scrutiny model that had been

39. *See* Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (explaining more about neutrality and general applicability); *see also* Christopher C. Lund, *A Matter Of Constitutional Luck: The General Applicability Requirement In Free Exercise Jurisprudence,* 26 HARV. J.L. & PUB. POL'Y 627, 633-44 (2003) (noting the debate and the positions in that debate).

40. *See* Marci Hamilton, *The Supreme Court Issues a Monumental Decision: Equal State Scholarship Access for Theology Students Is Not Required by the Free Exercise Clause*, Findlaw (Feb. 27, 2004), *available at* http:// writ.news.findlaw.com/hamilton/20040227.html ("The Court could not have been clearer: There are few instances where strict scrutiny is justified under the Free Exercise Clause. In Free Exercise challenges, *hostility to religion must be shown* for strict scrutiny to apply.") (emphasis in original); *see also* Thomas v. Anchorage Equal Rights Com'n, 165 F.3d 692, 702 (9th Cir. 1999) (rejecting a Free Exercise claim because there was "no indication that Alaska lawmakers were impelled by a desire to target or suppress religious exercise" in enacting the relevant law), *vacated on ripeness grounds*, 220 F.3d 1134 (9th Cir. 2000).

41. Others also have heavily criticized *Smith* from a number of directions. *See, e.g.*, Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990); *see also* James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1409 n.15 (1992) (collecting scholarly criticisms).

42. *Smith* is now 20 years old. *Sherbert* was 27 years old when *Smith* was decided. *Yoder* was at that time 18 years old. *See Smith*, 494 U.S. 872 (1990); Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

43. *See* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb (2006)).

jettisoned in *Smith*. RFRA was a statute rather than a constitutional provision, but the effect was the same. The clock was turned back. Burdens on religious liberty were again evaluated under a compelling-interest framework.[44] But RFRA provoked controversy. And in *City of Boerne v. Flores*,[45] the Court broke RFRA up into two parts—the part that modified federal law and the part that modified state law. The latter, the Court held, was unconstitutional. It was beyond the power of Congress to so modify state laws. But *Boerne* left RFRA's application to federal law untouched.[46]

RFRA's meaning in that context was taken up for the first time a few terms ago in *Gonzales v. O Centro Espírita Beneficente União do Vegetal*.[47] The Supreme Court considered whether a Brazilian group had the right to import hoasca, a sacramental tea, even though doing so violated federal law because hoasca contains dimethyltryptamine (DMT), a prohibited Schedule I substance.[48] The Supreme Court gave the plaintiffs a preliminary injunction against enforcement of the law, finding that the government had failed to demonstrate a compelling interest in denying the UDV their tea. The Court rejected the government's claim that it always had a compelling interest in prohibiting Schedule I substances as too generalized.[49] And the Court rejected the government's more specific claim that hoasca posed health and safety risks as unsubstantiated.[50] By rejecting overly general reasons altogether and by insisting that specific reasons be proven, the Supreme Court gave RFRA the sort of expansive interpretation it deserved. And in some ways, it left us to wonder whether religious liberty was even better off under *Gonzales* than it had been before *Smith*. Think of the position taken by Justice O'Connor. Concurring in *Smith*, she held onto the strict scrutiny model, but found that Oregon had a compelling interest in stopping peyote. Representing the middle of the Court,

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44. *See* 42 U.S.C. § 2000bb-1(b) ("Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."); *see also* Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 172 (1995) ("RFRA rejects wholesale selected aspects of [*Smith*] . . . and replaces [it] with instructions to return to the future; that is, to reemploy doctrines gleaned from prior law developed in [Free Exercise] adjudication.").

45. 521 U.S. 507 (1997). For a probing analysis of *Boerne* shortly after it was decided, see Robert F. Drinan, *Reflections on the Demise of the Religious Freedom Restoration Act*, 86 GEO. L.J. 101 (1997).

46. *See* Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 743, 745 (1998) ("*Flores* held that RFRA is unconstitutional as applied to state and local governments. The decision does not affect RFRA's application to federal law, which is based on Congress's Article I powers and in no way depends on the Fourteenth Amendment.").

47. 546 U.S. 418 (2006). One casenote provides an extensive factual overview of *Gonzales*. *See* Aaron D. Bieber, Note, *The Supreme Court Can't Have it Both Ways Under RFRA: The Tale of Two Compelling Interest Tests*, 7 WYO. L. REV. 225 (2007).

48. *Id.* at 425 (noting that hoasca is "a sacramental tea" that "contains dimethyltryptamine (DMT), a hallucinogen," which "is listed in Schedule I of the Controlled Substances Act").

49. *Id.* at 432 ("Under the more focused inquiry required by RFRA and the compelling interest test, the Government's mere invocation of the general characteristics of Schedule I substances, as set forth in the Controlled Substances Act, cannot carry the day.").

50. *Id.* at 437 ("The Government failed to convince the District Court at the preliminary injunction hearing that health or diversion concerns provide a compelling interest in banning the UDV's sacramental use of hoasca . . . [and] cannot compensate for that failure now.").

her opinion in *Smith* perhaps best represents how the *Sherbert/Yoder* standard was applied in practice. In *Smith*, she accepted the government's contention that no religious exemption was possible because Schedule I substances were inherently dangerous and because allowing any exceptions at all would threaten the regulatory scheme.[51] But *Gonzales* utterly rejects that position. In fact, it mocks it—Chief Justice Roberts called it "the classic rejoinder of bureaucrats throughout history."[52] *Gonzales* thus required what *Sherbert/Yoder* only purported to require—that government assert interests rather than just uniform laws, and that government prove the compelling nature of those interests with the ordinary tools of litigation. If followed faithfully by lower courts, *Gonzales* can provide significant protection for religious liberty.[53]

II. AN INTRODUCTION TO STATE RFRAS

Gonzales bodes well for religious liberty. But its limitations are obvious. *Gonzales* only protects against burdens imposed by the federal government. But usually when religious liberty is burdened, it is burdened by state and local governments. *Gonzales* offers no protection against those burdens. In this way, *Gonzales* can give some very false impressions. Just consider the state of the law today as regards hoasca. *Gonzales* gave the UDV an exemption from federal law to use hoasca. But that does not mean that the UDV can actually use hoasca. Apart from New Hampshire and Vermont, every state bases their drug laws on the Uniform Controlled Substances Act.[54] And the Uniform Controlled

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51. *See* Employment Div. v. Smith, 494 U.S. 872, 905-06 (O'Connor, J., concurring in the judgment) ("Oregon's criminal prohibition represents that State's judgment that the possession and use of controlled substances, even by only one person, is inherently harmful and dangerous . . . . Moreover, in view of the societal interest in preventing trafficking in controlled substances, uniform application of the criminal prohibition at issue is essential to the effectiveness of Oregon's stated interest in preventing any possession of peyote.").

Professor Lupu has probably phrased this concern best: "Behind every free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe." Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 947 (1989).

52. *Gonzales*, 546 U.S. at 436. Chief Justice Robert's full point was this:

> [The government's argument] rests not so much on the particular statutory program at issue as on slippery-slope concerns that could be invoked in response to any RFRA claim for an exception to a generally applicable law. The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions.

Id. at 435-36; *see also* Laura Krugman Ray, *The Style of a Skeptic: The Opinions of Chief Justice Roberts*, 83 IND. L.J. 997, 1026 (2008) (pondering how this quotation from *Gonzales* and other opinions might offer insight into the style and views of the Chief Justice), For another reflection on this passage from *Gonzales*, see Joshua D. Dunlap & Richard W. Garnett, *Taking Accommodation Seriously: Religious Freedom and the O Centro Case*, 2006 CATO SUP. CT. REV. 257, 274-75.

53. There is always the question of whether it will be followed faithfully. One early report is skeptical. *See* Matthew Nicholson, Note, *Is* O Centro *a Sign of Hope for RFRA Claimants?*, 95 VA. L. REV. 1281 (2009).

54. "Forty-eight out of fifty states adopted the Uniform Controlled Substances Act in one form or another." Elaine M. Chiu, *The Challenge of Motive in the Criminal Law*, 8 BUFF. CRIM. L. REV. 653, 699 (2005); *see also* Kevin G. Meeks, *From* Sindell *to Street Pushers: Imposing Market Share Tort Liability on Illegal Drug Dealers*, 33 GA. L. REV. 315, 324 n.50 (1998) ("Every state except New Hampshire and Vermont has adopted some version of the Uniform Controlled Substances Act.").

Substances Act prohibits hoasca.[55] So apart from New Hampshire and Vermont, it turns out that every state criminalizes hoasca.[56] And none of them make any exception for religious use.[57] So, at the end of the day, *Gonzales* only really applies in two of the smallest of the fifty states. In the other forty eight, the UDV Church has no legal right to exist. They can practice their religion only under constant threat of criminal and civil penalties. That is no great triumph for religious liberty.

This reinforces a key and often overlooked point. *Smith* and *Boerne* together mean that we live today in a multiple-exemption regime. Religious observers will need to win exemptions from all the legal regimes that bind them—from federal laws, from state laws, and from local laws. They must wage battles in every political sphere simultaneously and they must win each one. If they fail anywhere, they fail completely.[58] For in our system of multiple sovereigns, being protected from one governmental entity offers no immunity from any other. So while the federal RFRA is necessary for the protection of religious liberty, it is not sufficient. States must also choose to accommodate religious freedom within their respective spheres.

This is where state RFRAs come into play. A number of states now have state RFRAs—state analogues to the federal Religious Freedom Restoration Act.

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55. *See* NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM CONTROLLED SUBSTANCES ACT OF 1994, § 204(3)(xv) (listing "dimethyltryptamine (other names: DMT)" as a prohibited Schedule I substance), *available at* http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ucsa94.pdf.

56. *See, e.g.*, ALA. CODE § 20-2-23 (LexisNexis 2006); ALASKA STAT. § 11.71.150 (2008); ARIZ. REV. STAT. ANN. § 36-2512 (2009); ARK. CODE ANN. § 20-64-402 (2002); CAL. HEALTH & SAFETY CODE § 11054 (West 2007); COLO. REV. STAT. ANN. § 18-18-203 (West 2009); CONN. GEN. STAT. ANN. § 21a-243 (West 2006); DEL. CODE ANN. tit. 16, § 4714 (2003); FLA. STAT. ANN. § 893.03 (West 2010); GA. CODE ANN. § 16-13-25 (2002); HAW. REV. STAT. ANN. § 329-14 (LexisNexis 2009); IDAHO CODE ANN. § 37-2705 (2009); 720 ILL. COMP. STAT. ANN. 570/204 (West 2009); IND. CODE ANN. 35-48-2-4 (LexisNexis 2009); IOWA CODE ANN. § 124.204 (West 2009); KAN. STAT. ANN. § 65-4105 (2009); KY. REV. STAT. ANN. § 218A.050 (LexisNexis 2007); LA. REV. STAT. ANN. § 40:964 (2010); ME. REV. STAT. ANN. tit. 17-A, § 1102 (2009); MD. CODE ANN., CRIM. LAW § 5-402 (LexisNexis 2009); MASS. ANN. LAWS ch. 94C, § 31 (LexisNexis 2009); MICH. COMP. LAWS SERV. § 333.7212 (LexisNexis 2009); MINN. STAT. ANN. § 152.02 (West 2010); MISS. CODE ANN. § 41-29-113 (West 2009); MO. ANN. STAT. § 195.017 (West 2010); MONT. CODE ANN. § 50-32-222 (2009); NEB. REV. STAT. ANN. § 28-405 (Lexis Nexis 2009); NEV. ADMIN. CODE § 453.510; N.J. STAT. ANN. § 24:21-5 (West 2009); N.M. STAT. ANN. § 30-31-6 (West 2009); N.Y. PUB. HEALTH LAW § 3306 (McKinney 2010); N.C. GEN. STAT. § 90-89 (2009); N.D. CENT. CODE § 19-03.1-05 (2010); OHIO REV. CODE ANN. § 3719.41 (LexisNexis 2009); OKLA. STAT. ANN. tit. 63, § 2-204 (West 2010); OREGON ADMIN. RULE, Div. 80, § 855-080-0021; 35 PA. STAT. ANN. § 780-104 (2000); R.I. GEN. LAWS § 21-28-2.08 (2002); S.C. CODE ANN. § 44-53-190 (2002); S.D.C.L. § 34-20B-14 (2004); TENN. CODE ANN. § 39-17-406 (2009); TEX. HEALTH & SAFETY CODE ANN. § 481.032 (Vernon 2009); UTAH CODE ANN. § 58-37-4 (2007); VA. CODE ANN. § 54.1-3446 (2009); WASH. REV. CODE ANN. § 69.50.204 (West 2010); W. VA. CODE ANN. § 60A-2-204 (LexisNexis 2005); WIS. STAT. ANN. § 961.14 (West 2009); WYO. STAT. ANN. § 35-7-1014 (2009).

57. *See* sources cited in *supra* note 56.

58. *See* Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. REV. 221, 229 ("Churches have to win these battles over and over, at every level of government. They have to avoid being regulated by the Congress, by the state legislatures, by the county commissions, by the city councils, and by the administrative agencies at each of these levels. Churches have to avoid being regulated this year and next year and every year after that. If they lose even once in any forum, they have lost the war . . . .").

The state RFRA movement began in 1993, three years after *Smith* and the year the federal RFRA passed. The movement hit its stride shortly after *City of Boerne v. Flores*.[59] Ten states passed their RFRAs in the years from 1998 to 2000. But while state RFRAs bills passed in some states, they failed in many others.[60] State RFRAs were opposed by a number of diverse groups.[61] And while much effort was spent on their behalf,[62] that opposition often won out.[63] State RFRAs, for example, were ultimately rejected in California and New York, two of the three largest states.[64] And recently the trend toward state RFRAs has slowed. Only three states have passed RFRAs in the past six years.[65]

In their effect, the enacted state RFRAs operate much like the federal

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59. 521 U.S. 507 (1997).

60. Professor Eugene Volokh, writing in 1999, found rejected RFRA bills in California, Georgia, Kansas, Louisiana, Maryland, Michigan, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Tennessee, Vermont, and Virginia. *See* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1468 n.6 (1999). Since he wrote, there have also been unsuccessful bills in Hawaii, Indiana, Kansas, Kentucky, Louisiana, Nevada, Oregon, New York, North Carolina, and West Virginia. *See* H.B. 2697, 21st Leg. (Haw. 2001); H.B. 1502, 21st Leg. (Haw. 2001); H.B. 1696, 20th Leg. (Haw. 1999); H.B. 1960, 113th Gen. Assem., 1st Reg. Sess. (Ind. 2003); H.B. 1371, 112th Gen. Assem., 2d Reg. Sess. (Ind. 2002); S.B. 552, 112th Gen. Assem., 1st Reg. Sess. (Ind. 2001); H.B. 1264, 111th Gen. Assem., 2d Reg. Sess. (Ind. 2000); H.B. 2040, 80th Leg., Reg. Sess. (Kan. 2003); H.B. 2782, 79th Leg., Reg. Sess. (Kan. 2001); H.B. 440, 2010 Leg., Reg. Sess. (Ky. 2010); H.B. 1522, 1999 Leg. (La. 1999); A.B. 246, 73rd Gen. Assem., Reg. Sess. (Nev. 2005); S.B. 6869, 233rd Sess. (N.Y. 2009); S.B. 6464, 2007 Leg., Off Sess. (N.Y. 1997); H.B. 681, 2005 Leg. (N.C. 2005); H.B. 403, 2003 Leg. (N.C. 2003); H.B. 646, 2001 Leg. (N.C. 2001); H.B. 2909, 71st Leg. (Or. 2001); H.B. 2524, 79th Leg., 2d Sess. (W.V. 2010); H.B. 3233, 79th Leg., 2d Sess. (W.V. 2010); S.B. 638, 79th Leg., 2d Sess. (W.V. 2010); S.B. 701, 79th Leg. (W.V. 2009); H.B. 4571, 78th Leg., 2d Sess. (W.V. 2008); S.B. 629, 78th Leg. (W.V. 2008). Of these states, Pennsylvania, Tennessee, and Virginia later changed their minds and enacted state RFRAs. *See infra* note 67.

61. Thomas C. Berg & Frank Myers, *The Alabama Religious Freedom Amendment: An Interpretative Guide*, 31 CUMB. L. REV. 47, 59-61 (2000-01) (describing the efforts of prison officials, architectural preservation groups, and teachers' unions to oppose or moderate the impact of Alabama's RFRA); Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 757 (1999) (describing the efforts of land use groups in opposing RFRAs in Texas, Illinois, and California); Bettina Krause, *Coalition Building and Legislative Realities*, 32 U.C. DAVIS L. REV. 811, 821 (1999) (statement of Steve McFarland, Director of the Center for Law and Religious Freedom) (describing opposition by "landmark preservationists, child welfare agencies, correctional facility officials, and gay rights groups, to name just a few").

62. *See, e.g.*, Erwin Chemerinsky, *Do State Religious Freedom Restoration Acts Violate the Establishment Clause or Separation of Powers?*, 32 U.C. DAVIS L. REV. 645, 645 (1999) ("The enactment of a state Religious Freedom Restoration Act ('RFRA') requires an enormous concerted effort by many people and groups. In California, I participated in that process and witnessed the huge amount of time spent by legislative staffs, legislators, numerous organizations, and countless individuals to agree on the appropriate language and garner the needed votes."); *see also* James A. Hanson, *Missouri's Religious Freedom Restoration Act: A New Approach to the Cause of Conscience,* 69 MO. L. REV. 853, 869-74 (2004) (discussing the legislative efforts surrounding the successful enactment of Missouri's RFRA).

63. *See supra* note 60 (providing citations to failed state RFRA bills); *see also* Bettina Krause, *Coalition Building and Legislative Realities*, 32 U.C. DAVIS L. REV. 811, 817 (1999) (statement of Michael Lieberman, Counsel for the Anti-Defamation League) ("Of the more than twenty state RFRAs introduced last year, only four were successful in state legislatures, and one of these was defeated by a governor's veto.").

64. *See supra* note 60 (providing citations); *see also* Alan Reinach, *Why We Need State RFRA Bills: A Panel Discussion*, 32 U.C. DAVIS L. REV. 823, 831-32 (1999) (discussing the efforts in California).

65. *See infra* note 67 and Table 1 (providing citations and information).

RFRA did before *Boerne*, requiring state and local laws that impede religious exercise to be justified by a compelling interest. These state RFRAs thus eliminate the *Smith* standard, rejecting it in favor of that of *Sherbert* and *Yoder*. As a typical example, consider the main operative part of Arizona's RFRA:

> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person is both:
>
> 1. In furtherance of a compelling governmental interest.
>
> 2. The least restrictive means of furthering that compelling governmental interest.[66]

66. *See* ARIZ. REV. STAT. ANN. §§41-1493.01(C) (2009).

Sixteen states have now passed state RFRAs of this generic type.[67] The below chart provides some basic information on them:

Table 1

State	Year	Required Threshold Showing
Connecticut	1993	Burden
Florida	1998	Substantial Burden
Illinois	1998	Substantial Burden
Rhode Island	1998	Restrictions on Religious Liberty
Alabama	1999	Burden
Arizona	1999	Substantial Burden
South Carolina	1999	Substantial Burden
Texas	1999	Substantial Burden
Idaho	2000	Substantial Burden
New Mexico	2000	Restrictions on Religious Liberty
Oklahoma	2000	Substantial Burden
Pennsylvania	2002	Substantial Burden
Missouri	2004	Restrictions on Religious Liberty
Virginia	2007	Substantial Burden
Utah	2008	Substantial Burden
Tennessee	2009	Substantial Burden

67. *See* ARIZ. REV. STAT. ANN. §§41-1493 to -1493.02 (2009); CONN. GEN. STAT. ANN. §52-571b (West 2009); FLA. STAT. ANN. §§761.01-.05 (West 2010); IDAHO CODE ANN. §§73-401 to -404 (2009); 775 ILL. COMP. STAT. ANN. 35/1-99 (West 2009); MO. ANN. STAT. §§1.302-.307 (West 2010); N.M. STAT. §§28-22-1 to 28-22-5 (2006); OKLA. STAT. ANN. tit. 51, §§251-258 (West 2010); 71 PA. CONS. STAT. ANN. §§2401-2407 (West 2009); R.I. GEN. LAWS §§42-80.1-1 to -4 (2006); S.C. CODE ANN. §§1-32-10 to -60 (2010); TENN. CODE ANN. § 4-1-407 (2009); TEX. CIV. PRAC. & REM. CODE ANN. §§110.001-.012 (Vernon 2009); UTAH CODE ANN. §§ 63L-5-101 to -403 (2008); VA. CODE ANN. §§ 57-1 to -2.02 (2009). Alabama's state RFRA is embedded in its state constitution. *See* ALA. CONST. art. I, § 3.01. This changes things slightly. It should make Alabama's RFRA immune from state constitutional challenges and prevent it from being narrowed or repealed by mere state statutes. *See* Thomas C. Berg & Frank Myers, *The Alabama Religious Freedom Amendment: An Interpretative Guide*, 31 CUMB. L. REV. 47, 56-58 (2000-01) (making these points). Also Utah's RFRA should probably be considered a state RLUIPA (or perhaps a state RLUA), given that it only applies to issues of land use. *See* UTAH CODE ANN. § 63L-5-101 (2008) ("This chapter is known as the 'Utah Religious Land Use Act.'").

This table documents some of the more obvious differences between these state RFRAs. Though all of the sixteen state RFRAs adopt a compelling-interest test, they differ in what they require as a threshold—that is, they differ in what a plaintiff must initially show in order to trigger the government's obligation to demonstrate a compelling interest.[68] Eleven of the sixteen take the approach of the federal RFRA, requiring that the plaintiff show a "substantial burden" on religious exercise before the compelling-interest test kicks in.[69] Two of these states—Arizona and Idaho—water this requirement down a bit by saying that this threshold showing is only meant to weed out "trivial, technical or de minimis" burdens.[70] Such language, for reasons that will be discussed, should be made part of all state RFRAs. Two other states seem to go further in this direction, dropping out the word "substantial" altogether, and requiring only that plaintiffs show a "burden" on religious exercise.[71] Finally, three other states avoid using the word "burden" at all, simply demanding that all "restrictions on religious liberty" be justified by compelling interests.[72] It is unclear what that change was originally meant to accomplish, but textually it would suggest dropping out the threshold issue of burden altogether.

A side-by-side comparison of the statutes reveals other differences between state RFRAs as well. Most state RFRAs allow winning plaintiffs to recover attorneys' fees and costs[73] just as the federal RFRA does[74]—although there are exceptions.[75] Four states explicitly allow successful plaintiffs to recover monetary damages,[76] while two states explicitly reject them[77] and others do not

68. *See* Table 1 (sorting the state RFRAs by type). Some commentators have offered other suggestions for how state RFRAs should be drafted, but those suggestions have so far not been taken. *See* Daniel O. Conkle, *Free Exercise, Federalism, and the States as Laboratories*, 21 CARDOZO L. REV. 493, 496-98 (1999) (exploring various different options that states could use in drafting their RFRAs); Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1503-04 (1999) (proposing a model state RFRA that asks generally whether substantial burdens on religious exercise are "justified").

69. The states are Arizona, Florida, Idaho, Illinois, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, and Utah. *See* Table 1 and note 67.

70. *See* ARIZ. REV. STAT. ANN. §§41-1493.01(E) (2009) ("In this section, the term substantially burden is intended solely to ensure that this article is not triggered by trivial, technical or de minimis infractions."); IDAHO CODE ANN. §§73-402(5) (2009) (same exact quoted language).

71. The states are Alabama and Connecticut. *See* Table 1 and note 67.

72. The states are Rhode Island, New Mexico, and Missouri. *See* Table 1 and note 67.

73. ARIZ. REV. STAT. ANN. § 41-1493.01(D) (2009); FLA. STAT. ANN. § 761.04 (West 2010); IDAHO CODE ANN. § 73-402(4) (2009); 775 ILL. COMP. STAT. ANN. 35/20 (West 2009); N.M. STAT. § 28-22-4(A)(2) (2006); OKLA. STAT. ANN. tit. 51, § 256(B) (West 2010); S.C. CODE ANN. § 1-32-50 (2010); TENN. CODE ANN. § 4-1-407(E) (2009); TEX. CIV. PRAC. & REM. CODE ANN. § 110.005(a)(4) (Vernon 2009); VA. CODE ANN. § 57-2.02(D) (2009).

74. 42 U.S.C. § 1988(b) (West 2009) (allowing attorneys' fees "[i]n any action or proceeding to enforce a provision of . . . the Religious Freedom Restoration Act of 1993"); *see also* Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 214 & nn. 161-62 (1995) (discussing this point).

75. *See* 71 PA. CONS. STAT. ANN. § 2405(f) (West 2009) ("Unless the court finds that the actions of the agency were dilatory, obdurate or vexatious, no court shall award attorney fees for a violation of this act.").

76. N.M. STAT. § 28-22-4(A)(2) (2000); OKLA. STAT. ANN. tit.. 51, § 256(A) (West 2010); R.I. GEN. LAWS § 42-80.1-4(2) (2006); TEX. CIV. PRAC. & REM. CODE ANN. § 110.005(a)(3) (Vernon 2009).

77. 71 PA. CONS. STAT. ANN. § 2405(f) (West 2009); VA. CODE ANN. § 57-2.02(D) (2009).

address the issue. There are also some other important differences between these state RFRAs. Some RFRAs have detailed notice and exhaustion procedures.[78] Some RFRAs have coverage exclusions—areas carved out by statute where the state RFRA does not apply or applies with less force.[79] These differences matter greatly, but we turn first to some even larger issues.

III. THE FAILURE OF STATE RFRAS

When one looks at these state RFRAs in the abstract, they can seem quite protective of religious liberty. After all, they legislatively restore the compelling-interest test of *Sherbert* and *Yoder*. If *Gonzales* is any guide, we might expect religious liberty to be thriving at the state level. But this is an incomplete account of what is going on. When we get beyond looking at the statutes themselves and start to examine things on the ground, our perspective changes.

A. THE LACK OF STATE RFRAS

We should begin by noting the most obvious point: many states do not have state RFRAs. Sixteen states have them. But that is less than one in three. RFRA bills failed in California and New York, where more than 1 out of every 6 Americans live.[80] Some states, to be sure, have state constitutional provisions protecting religious liberty.[81] But that still leaves about 15 to 20 states with neither a state RFRA nor such a constitutional provision. In those jurisdictions, *Smith* rules. *Gonzales* may be generous in giving religious exemptions from federal laws to people in those states. But *Gonzales* can do nothing to provide exemptions from state and local laws, which are the main source of trouble for religious believers.

B. THE LACK OF STATE RFRA CASES

Yet even in the states that have state RFRAs, there is reason to doubt that state RFRAs provide meaningful protection for religious observance. State RFRAs have been heavily litigated in some states, like Texas, Illinois, and Florida.[82] But in many jurisdictions, there is virtually no state RFRA litigation. Some simple numbers are quite shocking. Alabama and South Carolina passed their state RFRAs in 1999. Idaho, New Mexico, and Oklahoma passed theirs in 2000. Ten years later, state and federal courts together have decided in reported decisions four Idaho RFRA claims,[83] three Oklahoma RFRA claims,[84] two

78. *See infra* Part III.E.

79. *See infra* Part III.F.

80. *See infra* note 64 (explaining that point).

81. *See infra* note 170; *see also* Laycock, *supra* note 9, at 211 & n.370.

82. *See infra* note 97 (providing citations to roughly twenty Florida RFRA cases).

83. Olsen v. Idaho State Bd. of Med. 363 F.3d 916 (9th Cir. 2004); Hyde v. Fisher, 203 P.3d 712 (Idaho Ct. App. 2009); Lewis v. Dep't of Transp., 146 P.3d 684 (Idaho Ct. App. 2006); Roles v. Townsend, 64 P.3d 338 (Idaho Ct. App. 2003).

South Carolina RFRA claims,[85] one Alabama RFRA claim,[86] and one New Mexico RFRA claim.[87] More than sixteen million people over more than 10 years in 5 states have apparently litigated just 11 state RFRA claims to judgment.[88] But even more amazingly, there are *no* decided state RFRA cases at all in four states—Rhode Island, Missouri, Virginia, and Utah. Those four state RFRAs have simply not been the subject of any reported judicial decisions. Take all this together, it means that of the 16 states with state RFRAs, 10 of them have two or fewer reported cases.

Some potential reasons may explain this or at least part of it. State court cases, particularly at the trial level, are hard to find; they may not be on Lexis or Westlaw, which for the most part is how these searches were conducted. And decided cases are certainly not all that matters. State RFRAs surely increase prospects of favorable settlements for religious claimants, both before and after complaints are filed.[89] So state RFRAs probably do some work that these numbers do not catch. But even with all these qualifiers, state RFRA litigation seems surprisingly light.[90]

There are many conceivable explanations for this. But I suspect a part of it is that the attorneys who bring Free Exercise cases may often be simply unaware of state RFRAs. These state RFRAs are well known to those who teach church and state classes, but they may be just obscure provisions of state law to practitioners. Practitioners usually do not specialize in Free Exercise the way they specialize in tax or bankruptcy; they have no reason to know about Title 51

84. Steele v. Guilfoyle, 76 P.3d 99 (Okla. Civ. App. 2003); Shrum v. City of Coweta, 558 F.Supp.2d 1212 (E.D. Okla. 2008); Baylis v. Oklahoma Dep't of Corr., No. CIV-07-987R, 2007 WL 4287612 (W.D. Okla. Dec. 5, 2007).

85. Jones v. South Carolina Dep't of Corr., No. 3:07-CV-1876-PMD-JRM, 2009 WL 890646 (D.S.C. March 30, 2009); Bryan v. Capers, No. 8:06-cv-2515-GRA-BHH, 2007 WL 2116452 (D.S.C. July 19, 2007).

86. Presley v. Edwards, No. 2:04-cv-729-WKW, 2007 WL 174153 (M.D. Ala. Jan. 19, 2007).

87. Elane Photography v. Willock, No. 2008-06632 (N.M. Trial Court, Dec. 11, 2009), *available at* http://volokh.com/wp/wp-content/uploads/2009/12/elanephotographytrialorder.pdf.

88. Another state with only one decided state RFRA case is Tennessee, but Tennessee's RFRA was passed in 2009. *See* Johnson v. Levy, No. M2009-02596-COA-R3-CV, 2010 WL 119288 (Tenn. Ct. App. Jan. 14, 2010).

89. This is an important point stressed by those who work in the field. *See, e.g., Protecting Religious Freedom After Boerne v. Flores: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 26, 26-27 (1997) (statement of Mark E. Chopko, General Counsel, U.S. Catholic Conference) ("RFRA served as an important tool in negotiation, bargaining, and reaching compromise."); Alan Reinach, *Why We Need State RFRA Bills: A Panel Discussion*, 32 U.C. DAVIS L. REV. 823, 832 (1999) (statement of Pat Nolan, President of the Justice Fellowship) ("I think the greatest significance that the Federal RFRA held was in bargaining. It gave a person a seat at the table with any government official whose conduct impeded one's ability to practice their faith."); *id.* at 844 (statement of Douglas Laycock, then a Professor at the University of Texas School of Law) ("I want to reinforce what Pat Nolan said. The common understanding of the meaning of *Smith* among government lawyers is: 'We don't have to talk to you anymore.'").

90. Professor Lupu offered similar qualifications regarding the reach of his study of the federal Religious Freedom Restoration Act, reminding us that there are "cases filed in which no reported opinions had been rendered . . . cases settled after the initiation of RFRA litigation, and . . . matters resolved without resort to litigation." Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 587 (1998).

of the Oklahoma Code.[91] Or it could be that attorneys are aware of these state RFRAs, but just do not believe that such claims are worth pursuing. They might trust the well known and assume that the Free Exercise Clause provides whatever protection is available. But whatever the reason, it is clear that attorneys are failing to bring state RFRA claims when they should. In many cases in states with an applicable state RFRA, plaintiffs have brought Free Exercise Clause claims alone without bringing corresponding state RFRA claims. These cases were lost under *Smith*, even though a properly pled state RFRA claim would have changed the standard of review.[92]

And if the number of state RFRAs cases itself is disappointing, even more disappointing are how scarce the victories are. In the four states without any decided state RFRA cases, obviously no plaintiff has ever won a court judgment. But victories are scarce in other states as well. There is one victory in Oklahoma,[93] and arguably one victory each in Idaho, Arizona, and Alabama.[94] There are no victories in New Mexico and South Carolina.[95] Yet even in states where litigation is heavy, victories are rare. Florida passed its RFRA early; it has seen substantial litigation. Yet of all the claims asserted over the years, only a single state Florida RFRA claim litigated to judgment has won.[96] And there

91. *See* OKLA. STAT. ANN. tit. 51, §§ 251-58 (West 2008) (Oklahoma's RFRA).

92. *See, e.g.*, Complaint in Littlefield v. Forney Independent School Dist., No. 3-00CV-0575T (filed N.D. Tex. Mar. 16, 2000) (on file with the author and with the South Dakota Law Review); Complaint in Trefelner ex rel. Trefelner v. Burrell School Dist., No. 2:05-mc-02025 (filed W.D. Pa. Aug. 8, 2009) (on file with the author and with the South Dakota Law Review); Complaint in Miller v. Weinstein, No. Civ. A. 06-224 (filed W.D. Pa. Feb. 20, 2006) (on file with the author and with the South Dakota Law Review); Amended Complaint in Menges v. Blagojevich, No. 3:05-cv-03307-JES-BGC (filed C.D. Ill. Mar. 17, 2006) (on file with the author and with the South Dakota Law Review); Complaint in Ferreira v. Harris, No. 06CV-163CVE-SAJ (filed N.D. Okla. Mar. 17, 2006) (on file with the author and the with South Dakota Law Review); Complaint in Vandersand v. Wal-Mart Stores, Inc., No. 3:06-cv-03292-JES-DGB (filed C.D. Ill. Dec. 12, 2006) (on file with the author and with the South Dakota Law Review). Sometimes even in cases where plaintiffs win, a state RFRA claim would have helped them. *See, e.g.*, Blackhawk v. Pennsylvania, 381 F.3d 202 (3d Cir. 2004) (winning under the Free Exercise Clause without having brought a Pennsylvania RFRA claim); Levitan v. Ashcroft, 281 F.3d 1313 (D.C. Cir. 2002) (reversing a summary judgment to the defendants on First Amendment grounds where the plaintiffs had not brought a RFRA claim).

93. *See* Shrum v. City of Coweta, Oklahoma, No. CIV-03-465-KEW, 2008 WL 868234 (E.D. Okla. Mar. 31, 2008).

94. It depends, of course, on what counts as a victory. Two cases involved plaintiffs obtaining relief on their RLUIPA claims, where the Court said something suggesting that they also might have won under their state RFRA claims as well. *See* Simonsen v. Arizona Dep't of Corr., No. 2 CA-CV 2008-0123, 2009 WL 1600401 (Ariz. Ct. App. June 8, 2009); Hyde v. Fisher, 146 Idaho 782, 203 P.3d 712 (Idaho Ct. App. 2009). I count these as victories, but only to be generous to the concept. In fact, they probably meant nothing practically speaking; the plaintiffs likely would have been entitled to as much relief without them. The other case involved a plaintiff apparently surviving a motion for summary judgment on his state RFRA claim, even though the court's opinion did not address it specifically. *See* Presley v. Edwards, No. 2:04-cv-729-WKW, 2007 WL 174153 (M.D. Ala. Jan. 19, 2007).

95. *See* Elane Photography v. Willock, No. 2008-06632 (N.M. Trial Court, Dec. 11, 2009), *available at* http://volokh.com/wp/wp-content/uploads/2009/12/elanephotographytrialorder.pdf.; Jones v. S.C. Dep't of Corr., No. 3:07-CV-1876-PMD-JRM, 2009 WL 890646 (D.S.C. Mar. 30, 2009); Bryan v. Capers, No. 8:06-cv-2515-GRA-BHH, 2007 WL 2116452 (D.S.C. July 19, 2007).

96. *See* Abbott v. City of Fort Lauderdale, 783 So.2d 1213 (Fla. Dist. Ct. App. 2001). Arizona too only has one example of a successful RFRA claim. *See* Simonsen v. Arizona Dep't of Corr., No. 2 CA-CV 2008-0123, 2009 WL 1600401 (Ariz. Ct. App. June 8, 2009).

have been a lot of litigated losses.[97] Of course, plaintiffs have won some important victories using state RFRAs.[98] These should not be overlooked. And tallying wins and losses may not be the best measure of the efficacy of a state RFRA anyway—many religious liberty claims are meritless and deserve to lose.[99] But it probably does mean something when more than half of the jurisdictions have no litigated victories under their state RFRAs. Attorneys will be even more likely to forget about state RFRAs or unwisely dismiss their potential. Courts will be less likely to take them seriously. And the leverage that such claims will provide in the bargaining process drops as well—a state will be less likely to settle state RFRA claims if it has never lost one before.

C. STATE RFRAS IN FEDERAL COURT

In the last section, this piece discussed the simple lack of state RFRA litigation. But another important issue is how when state RFRA claims are brought, they are often brought in the wrong place. Attorneys are used to bringing First Amendment claims in federal court. So when a religious liberty dispute arises, an attorney will probably think first of filing there. She might not think of a state RFRA claim. But if she does, she will probably just include it as another claim in her federal complaint. Yet this creates a problem, because federal courts will often lack the power to properly adjudicate these claims. These obstacles are largely unrelated to the Religion Clauses, but they are

97. *See* Youngblood v. Florida Dep't of Health, 224 Fed. App'x 909 (11th Cir. 2007); Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County, 450 F.3d 1295 (11th Cir. 2006); Konikov v. Orange County, 410 F.3d 1317 (11th Cir. 2005); Lawson v. Aleph Inst., No. 4:04-cv-00105-MP-AK, 2009 WL 4404720 (N.D. Fla. Dec. 2, 2009); First Vagabonds Church Of God v. City Of Orlando, 578 F.Supp.2d 1353 (M.D. Fla. 2008); Brown v. United States, No. 5:06-cv-288-Oc-10GRJ, 2007 WL 2572106 (M.D. Fla. Sept. 4, 2007); Lawson v. McDonough, No. 4:04-cv-00105-MP-AK, 2006 WL 3844474 (N.D. Fla. Dec. 27, 2006); Men of Destiny Ministries, Inc. v. Osceola County, No. 6:06-cv-624-Orl-31DAB, 2006 WL 3219321 (M.D. Fla. Nov. 6, 2006); Hollywood Cmty. Synagogue, Inc. v. City of Hollywood, 430 F.Supp.2d 1296 (S.D. Fla. 2006); Hill v. Williams, No. 5:03cv192/MCR/EMT, 2005 WL 5993338 (N.D. Fla. Oct. 14, 2005); Williams Island Synagogue, Inc. v. City of Aventura, 358 F.Supp.2d 1207 (S.D. Fla. 2005); Open Homes Fellowship, Inc. v. Orange County, 325 F.Supp.2d 1349 (M.D. Fla. 2004); Calvary Chapel Church, Inc. v. Broward County, 299 F.Supp.2d 1295 (S.D. Fla. 2003); Wilson v. Moore, 270 F.Supp.2d 1328 (N.D. Fla. 2003); Sephardi v. Town of Surfside, No. 99-1566-CIV, 2000 WL 35633163 (S.D. Fla. July 31, 2000); Warner v. City of Boca Raton, 887 So.2d 1023 (Fla. 2004); Westgate Tabernacle, Inc. v. Palm Beach County, 14 So.3d 1027 (Fla. Dist. Ct. App. 2009); McGlade v. State, 982 So. 2d 736 (Fla. Dist. Ct. App. 2008); Freeman v. Dep't of Highway Safety and Motor Vehicles, 924 So. 2d 48 (Fla. Dist. Ct. App. 2006); Muhammad v. Crosby, 922 So.2d 236 (Fla. Dist. Ct. App. 2006); Toca v. State, 834 So.2d 204 (Fla. Dist. Ct. App. 2002); Yasir v. Singletary, 766 So.2d 1197 (Fla. Dist. Ct. App. 2000); First Baptist Church of Perrine v. Miami-Dade County, 768 So.2d 1114 (Fla. Dist. Ct. App. 2000).

98. *See* Nelson v. Miller, 570 F.3d 868 (7th Cir. 2009); Merced v. Kasson, 577 F.3d 578 (5th Cir. 2009); Shrum v. City of Coweta, 558 F.Supp.2d 1212 (E.D. Okla. 2008); Deveaux v. City of Philadelphia, No. 3103 FEB.TERM 2005, CONTROL 3103, 2005 WL 1869666 (Pa. Com. Pl. July 14, 2005); Barr v. City of Sinton, 295 S.W.3d 287 (Tex. 2009); City of Chicago Heights v. Living Word Outreach Full Gospel Church and Ministries, Inc., 749 N.E.2d 916 (Ill. 2001); Johnson v. Levy, No. M2009-02596-COA-R3-CV, 2010 WL 119288 (Tenn. Ct. App. Jan. 14, 2010).

99. *See, e.g.*, Elliot M. Mincberg, *A Progressive Organization's Look at RFRA*, 21 CARDOZO L. REV. 801, 804 (1999) (noting that it is "not necessarily bad" that "religious litigants only win a relatively small percentage of cases" under RFRA, because there are a lot of religious freedom claims that should not succeed). Also, as discussed earlier, leverage in the bargaining process is a key virtue of state RFRAs, which does not show up in studies of the reported cases. *See supra* note 89.

important obstacles just the same.

The first obstacle lies in the doctrine of supplemental jurisdiction. Under this doctrine, federal courts have the power to decide state-law claims connected to federal claims.[100] So in a case with a Free Exercise (or RLUIPA) claim, a federal court has supplemental jurisdiction to hear a state RFRA claim as well. But the key is this. Federal courts will often not assert supplemental jurisdiction over state claims once all the federal claims have been resolved.[101] So a federal court that rejects a plaintiff's federal Free Exercise claim (or RLUIPA claim) will usually then dismiss the plaintiff's suit entirely and never even get to any state RFRA claim that the plaintiff has also brought. This has happened quite frequently.[102] And another point comes in here too. A federal court will also dismiss a state RFRA claim when the plaintiff is *successful* on his federal claims, on the theory that resolving the state RFRA claim is now an unnecessary waste of time.[103] When you take those two points together, you see that federal courts have the power to decline to hear state RFRA cases altogether. This can cause serious waste. A plaintiff who spends years in federal court litigating his less powerful Free Exercise claim only to have to then re-file his better state RFRA claim in state court will have wasted a lot of time and resources. And he may not be inclined to start the whole thing over again.

The second obstacle lies with an issue of remedies and state sovereign immunity. In *Pennhurst State School. & Hospital v. Halderman*,[104] the Supreme Court held that the Eleventh Amendment prohibits federal courts from ordering

100. *See* 28 U.S.C. §1367(a) (2009) ("[T]he district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.").

101. *See* 28 U.S.C. §1367(c) (2009) ("[T]he district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . (3) the district court has dismissed all claims over which it has original jurisdiction[.]"); *see also* Deborah J. Challener & John B. Howell III, *Remand and Appellate Review Issues Facing the Supreme Court in Carlsbad Technology, Inc. v. HIF Bio., Inc.*, 103 NW. U. L. REV. COLLOQUY 418, 419 (2009) (explaining how "supplemental jurisdiction 'is a doctrine of discretion, not of plaintiff's right'") (quoting City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156, 172 (1997)).

102. *See, e.g.*, Combs v. Homer-Center Sch. Dist., 540 F.3d 231 (3d Cir. 2008); Jones v. South Carolina Dep't of Corr., No. 3:07-CV-1876-PMD-JRM, 2009 WL 890646 (D. S.C. March 30, 2009); Bryan v. Capers, No. 8:06-cv-2515-GRA-BHH, 2007 WL 2116452 (D. S.C. July 19, 2007); Pinkston-El v. Snyder, No. 02-CV-1031-JPG, 2006 WL 2385278 (S.D. Ill. Aug. 17, 2006); Castle Hills First Baptist Church v. City of Castle Hills, No. SA-01-CA-1149-RF, 2004 WL 546792 (W.D. Tex. March 17, 2004); Green v. City of Philadelphia, No. Civ.A. 03-1476, 2004 WL 1170531 (E.D. Pa. May 26, 2004); Pelletier v. Maine Principals' Ass'n, 261 F.Supp.2d 10 (D. Me. 2003); Leebaert ex rel. Leebaert v. Harrington, 193 F.Supp.2d 491 (D. Conn. 2002); C.L.U.B. v. City of Chicago, 157 F.Supp.2d 903 (N.D. Ill. 2001); Quental v. Connecticut Comm'n on Deaf and Hearing Impaired, 122 F.Supp.2d 133 (D. Conn. 2000).

103. *See* Calvary Chapel Church, Inc. v. Broward County, Fla., 299 F.Supp.2d 1295 (S.D. Fla. 2003) (dismissing a plaintiff's Florida RFRA claims because of the success of the plaintiff's First Amendment Free Speech claim); Nichol v. ARIN Intermediate Unit 28, 268 F.Supp.2d 536 (W.D. Pa. 2003) (dismissing a Pennsylvania RFRA claim because of the success of the attached Free Exercise claim); *cf.* Wilson v. Moore, 270 F.Supp.2d 1328 (N.D. Fla. 2003) (doing the same even though the plaintiff's Free Exercise and Equal Protection Claim were only partially successful and only entitled the plaintiff to part of the relief he was seeking).

104. 465 U.S. 89 (1984).

state officials to comply with state law.[105] *Pennhurst* matters greatly for state RFRA claims, because it means that federal courts hearing state RFRA claims often have no power to give a plaintiff injunctive relief, even if he wins on the merits.[106] Now *Pennhurst* only protects states—local government units like cities, counties, and school boards have no Eleventh Amendment immunity.[107] So they *can* be enjoined by federal courts under state RFRAs.[108] But where the defendant is the state itself, bringing state RFRA claims in federal court is practically useless; there is little point in bringing claims for which there is no possibility of an effective remedy. And indeed, in this context, bringing such claims is worse than useless. Under the supplemental jurisdiction statute, the statute of limitations is usually tolled for pendant state-law claims while they are in federal court.[109] But there is no tolling for state-law claims that get dismissed on Eleventh Amendment grounds.[110] All this is to say that for state RFRA claims brought in the wrong court initially, it will often be too late to correct the error later.

These obstacles are important. They are in some sense procedural, but they affect substance. They prevent federal courts from acting to redress real claims. And this again emphasizes just how important states now are in the protection of religious liberty. Just as religious groups now depend on state law for their rights to religious exercise, they now depend on state courts for the vindication of those rights. Attorneys need to get used to bringing these claims in state court. Their important efforts—and the right of religious liberty—may be lost otherwise.

D. THE INTERPRETATIONS OF STATE RFRAS

Let us assume the rosy picture of a state with a state RFRA and a state

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105.

> A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.

Id. at 106.

106. *See, e.g.*, Smithback v. Crain, No. 07-10274, 2009 WL 552227 (5th Cir. Mar. 5, 2009) (concluding that an injunction ordering Texas state officials to comply with Texas' state RFRA is inappropriate under *Pennhurst*); Sossamon v. Lone Star State of Texas, 560 F.3d 316 (5th Cir. 2009) (same); Goodman v. Carter, No. 2000 C 948, 2001 WL 755137 (N.D. Ill. July 2, 2001) (same with regards to Illinois' state RFRA).

107. *See* Mount Healthy City Sch. Dist. v. Doyle, 429 U.S. 274 (1977) (school boards); Workman v. New York, 179 U.S. 552 (1900) (cities); Lincoln County v. Luning, 133 U.S. 529 (1890) (counties).

108. *See, e.g.*, Merced v. Kasson, 577 F.3d 578 (5th Cir. 2009) (ordering injunctive relief against municipal officials pursuant to Texas's state RFRA).

109. *See* 28 U.S.C. §1367(d) (2009) ("The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.").

110. *See* Raygor v. Regents of the Univ. of Minn., 534 U.S. 533, 541-46 (2002) (holding that the supplemental jurisdiction statute does not toll the statute of limitations as regards state law claims dismissed by a federal court on grounds of state sovereign immunity).

RFRA claim that is resolved on its merits. Perhaps the most troubling part of a detailed examination of state RFRAs is how courts interpret them. Courts often interpret state RFRAs in an incredibly watered down manner that does not resemble *Gonzales*-style review or even *Sherbert/Yoder*-style review. This is one of the surest ways of taking the teeth out of state RFRAs.

One consistent problem has been simply in understanding what state RFRAs do. A surprising number of courts have interpreted state RFRAs to provide less protection than the constitutional clauses they were meant to augment. This may be hard for us to understand, but it happens with regularity. Florida offers some good examples. One Florida court found a federal Free Exercise Clause violation under *Smith*,[111] but still rejected the Florida RFRA claim.[112] Another court rejected the state RFRA claim[113] after finding actual intentional religious discrimination prohibited by *Lukumi*.[114] A third court struck down a zoning ordinance under the Equal Protection Clause on the ground that there was no rational basis for it, which apparently was easier than deciding the merits of the plaintiff's state RFRA claim.[115] This seems like judicial confusion, pure and simple. State RFRAs are supposed to be more powerful than the Free Exercise Clause or the Equal Protection Clause—not less. But courts misunderstand that, and frequently interpret state RFRAs to mean very little indeed.

As another example, take the current situation in Connecticut. Textually speaking, Connecticut has one of the strongest RFRAs. Adopted back in 1993, it rejects the substantial-burden standard, requiring only that plaintiffs show a "burden" on religious exercise.[116] It has no coverage exclusions—no subject areas where it either does not apply or applies with less force. And the

111. *See* First Vagabonds Church Of God v. City Of Orlando, Fla., 578 F.Supp.2d 1353, 1362 (M.D. Fla. 2008) ("[T]he Court finds that the application of this Ordinance violates the First Amendment rights of Nichols and FVCG [under *Smith* and *Lukumi*].").

112. *Id.* at 1361-62 ("[T]his Court held that Plaintiffs have failed to show that the Ordinance places a 'substantial burden' on this activity as defined under the FRFRA.").

113. Hollywood Cmty. Synagogue, Inc. v. City of Hollywood, Fla., 430 F.Supp.2d 1296, 1321-22 (S.D. Fla. 2006) (noting that "the Court [has] previously found that Plaintiff had not demonstrated a substantial burden . . . [and therefore] finds that Plaintiff's Florida RFRA claims fail to state a claim upon which relief may be granted").

114. *Id.* at 1315 ("In short, the Synagogue has provided ample evidence of a City policy and practice of harassment and selective enforcement against the Synagogue, and further demonstrated that nothing was done to prevent this conduct despite the fact that such policy was well known or should have been well known to City officials.").

115. Open Homes Fellowship, Inc. v. Orange County, Fla., 325 F.Supp.2d 1349, 1365 (M.D. Fla. 2004) (concluding that "the County's ordinance on religious institutions violated Open Homes' equal protection rights" and not addressing the Florida RFRA claim).

116. *See* CONN. GEN. STAT. ANN. §52-571b(a) (West 2005) ("The state or any political subdivision of the state shall not *burden* a person's exercise of religion . . . except as provided in subsection (b) of this section.") (emphasis added); *cf.* Murphy v. Zoning Com'n of Town of New Milford, 289 F.Supp.2d 87, 114-15 (D. Conn. 2003) ("That statute is modeled after RFRA, which the Supreme Court has held to be unconstitutional as applied against the States . . . [But] ACRF literally requires only a 'burden,' rather than a 'substantial burden.'") (citation omitted); Cambodian Buddhist Soc'y of Conn, v. Newtown Planning and Zoning Com'n, No. CV030350572S, 2005 WL 3370834, at *6 (Conn. Super. Nov. 18, 2005) [hereinafter *Cambodian I*] ("While the RLUIPA requires a 'substantial burden' on religious exercise, RFA merely requires a 'burden' on religious exercise.").

legislators who passed Connecticut's RFRA made clear what it was supposed to do: "[T]he overarching purpose of § 52-571b was to provide more protection for religious freedom under Connecticut law than the *Smith* decision would provide under federal law."[117]

It is surprising then to find that Connecticut courts interpret their RFRA to mean simply *Smith* and nothing more. An influential opinion adopted by the Connecticut Court of Appeals said this about its RFRA:

> Churches and religious organizations can be regulated under a state's police power if that regulation is religiously neutral and for secular purposes . . . "The first amendment cannot be extended to such an extent that a claim of exemption from the laws based on religious freedom can be extended to avoid otherwise reasonable and neutral legal obligations imposed by government." Grace Community Church v. Bethel, Superior Court, judicial district of Danbury, Docket No. 306994, 1992 WL 174923 (July 16, 1992) (Fuller, J.), citing Employment Division v. Smith, 494 U.S. 872, 888, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990).[118]

The citation to *Smith* jumps off the page. Connecticut here has done the one thing almost unimaginable; it has interpreted its RFRA as equivalent to the very standard it was intended to supersede. Following this opinion, Connecticut cases repeat the maxim that state laws are immune from challenge when they are "religiously neutral and for secular purposes."[119] And, to be clear, they mean this just as a ban on intentional discrimination: "Secular concerns such as safety do not impinge on the exercise of religion, assuming, of course, that the recitation of such concerns is not a mere pretext . . . The statutes seeking to preserve the value of freedom of religion [i.e., Connecticut's RFRA] can peacefully coexist [with such secular concerns] so long as those concerns are not used to mask discriminatory intent."[120] Without a showing of discriminatory

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117. Rweyemamu v. Comm'n on Human Rights and Opportunities, 911 A.2d 319, 328 (Conn. App. Ct. 2006) (discussing the legislative history of the bill). The Connecticut Supreme Court later made the same point:

> Like RFRA, § 52-571b was enacted in response to the United States Supreme Court's decision in Employment Division, Dept. of Human Resources v. Smith, . . . in which the court held that a generally applicable prohibition against socially harmful conduct does not violate the free exercise clause, regardless of whether the law burdens religious exercise. Also like RFRA, the purpose of § 52-571b was to restore the balancing standard, articulated by the United States Supreme Court in Sherbert v. Verner, supra, at 374 U.S. at 403, 83 S.Ct. 1790, under which a law that burdens religious exercise must be justified by a compelling governmental interest.

Cambodian Buddhist Soc'y of Conn. v. Planning and Zoning Comm'n, 941 A.2d 868, 895 (Conn. 2008) [hereinafter *Cambodian II*].

118. First Church of Christ, Scientist v. Historic Dist. Comm'n of Ridgefield, 738 A.2d 224, 231 (Conn. Super. Ct. 1998), *opinion adopted by* First Church of Christ, Scientist v. Historic Dist. Com'n of Town of Ridgefield, 737 A.2d 989, 989-90 (Conn. App. Ct. 1999) (accepting this language as a "well reasoned decision" regarding the plaintiff's claim that it was deprived of its right to "free exercise of religion in violation of General Statutes § 52-571b [Connecticut's RFRA]").

119. Cross Street, LLC v. Zoning Bd. of Appeals of Town of Westport, No. CV064008077, 2007 WL 448684, at *5 (Conn. Super. Ct. Jan. 26, 2007) ("The Connecticut Religious Freedom Act, General Statutes § 52-571b (RFA) prohibits a state or local authority from placing a 'burden on a person's exercise of religion' . . . [but] churches and religious organizations can be regulated under the police power as long as the regulation is religiously neutral and for secular purposes."); *see also Cambodian I*, *supra* note 116, at *10-*11 (similar).

120. Farmington Ave. Baptist Church v. Town of Farmington Planning and Zoning Comm'n, No.

intent then, religious observers can have no claim under Connecticut's RFRA. This is not just *Smith*—this is the narrowest conceivable interpretation of *Smith*.[121] This cannot be what Connecticut's RFRA means, whatever its courts say.

Courts also have trouble with the threshold requirements, and Connecticut again offers an example. In 2008, the Connecticut Supreme Court decided *Cambodian Buddhist Society*, a case where a Buddhist group sought a special exception to build a Temple on its property.[122] The town's zoning and planning commission denied the exception, and the Connecticut Supreme Court ultimately affirmed, rejecting the plaintiffs' Connecticut RFRA claim and other claims. But its reasoning was startling. It did not hold there was some compelling interest. It did not hold that the plaintiffs' religious liberty was insufficiently burdened. Instead, the Court held that the construction of a place of worship simply was not religious exercise at all. This was not about the plaintiffs being Buddhists. This was not about the plaintiffs wanting to use the property for something other than worship. The Court simply held as a categorical matter that building a place of worship was not religious exercise under the state's RFRA:

> The United States Supreme Court has not considered the extent to which the construction and use of places of worship constitute the exercise of religion under the free exercise clause of the first amendment. Our research, however, has revealed no pre-*Smith* cases supporting the proposition that the construction and use of a place of worship constitutes the exercise of religion per se.[123]

Perhaps the reason why the United States Supreme Court had never considered whether building a place of worship is the exercise of religion before is because it had never been disputed or litigated before. On the theory announced by the Connecticut Supreme Court here, a government that wanted to ban the Mass could do so by simply banning people from building any place in which to conduct the Mass. On this theory, instead of declaring RFRA unconstitutional, *City of Boerne v. Flores*[124] should have just held RFRA inapplicable—after all, the plaintiffs there too were seeking to build a church, which apparently is not religious exercise, at least in Connecticut. Again, *Cambodian Buddhist Society* was not a holding about burden; the Connecticut Supreme Court did not say that the zoning ordinances did not sufficiently burden religious exercise. It said that all land-use restrictions are legitimate under Connecticut's RFRA, regardless of the burden, because what they burden is not

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CV010811563S, 2003 WL 21771916, at *5 n.4. (Conn. Super. Ct. July 9, 2003); *see also Cambodian I*, *supra* note 116, at *11 (quoting *Farmington*).

121. *See supra* note 40 (providing citations to commentators and courts who adopt such a view). For an example of a broader interpretation of *Smith*, see Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999).

122. *See Cambodian II*, *supra* note 117.

123. *Cambodian II*, *supra* note 117, at 889 n.20 (citation omitted).

124. 521 U.S. 507 (1997).

religious exercise. This too simply cannot be right.[125]

On the burden issue, consider also the *Freeman* case.[126] The plaintiff there was Sultaana Freeman, a Muslim woman. In February 2001, she applied for a Florida drivers' license. But she insisted on wearing a Muslim veil known as the niqab, which covered her face apart from her eyes. Florida initially gave her the license without any problem. But nine months later in November 2001, after the events of September 11th, Florida wrote her back. Florida claimed it had erroneously given her a license and insisted that she come back to be photographed without the veil. She refused. Florida revoked her license and she sued. The court upheld Florida's decision to revoke her license, holding that the photographing requirement had not substantially burdened Freeman's religious exercise.[127]

Freeman had asserted a burden on her religious exercise. The court itself explained this early on: "Freeman testified that taking a photograph without her veil 'is just not an option.' She firmly believes that Islam mandates that she wear the veil in situations such as this, i.e., the taking of a photograph."[128] But the court came to doubt her beliefs, because of contrary expert testimony:

> [The expert] testified that in Islamic countries there are exceptions to the practice of veiling. Consistent with Islamic law, women are required to unveil for medical needs and for certain photo ID cards . . . The only qualification is that the taking of the photograph accommodate Freeman's beliefs. Here, the Department's existing procedure would accommodate Freeman's veiling beliefs by using a female photographer with no other person present . . . [W]e affirm the trial court's conclusion because it does not compel Freeman to engage in conduct that her religion forbids — her religion does not forbid all photographs. Her veiling practice is merely inconvenienced by the photograph requirement.[129]

The court essentially says that because other Muslim women in other countries remove the veil for photographs, Freeman should consider herself free to do so as well. But this just amounts to telling Freeman she is wrong about her religion. And that is a problem. Individuals have a right to religious accommodation even on matters where they differ from their co-religionists. The Supreme Court has been clear about this.[130] And deep down, the court here

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125. *Cf.* Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 755-56 (1999) ("The right to assemble for worship is at the very core of religious liberty. In every major religious tradition – Christian, Jewish, Muslim, Buddhist, Hindu, whatever – communities of believers assemble together, at least for shared rituals and usually for other activities as well.")

126. Freeman v. Dep't of Highway Safety and Motor Vehicles, 924 So.2d 48 (Fla. Dist. Ct. App. 2006). For another analysis of *Freeman*, see Patrick T. Currier, Note, Freeman v. State of Florida: *Compelling State Interests and the Free Exercise of Religion in Post-September 11th Courts*, 53 CATH. U. L. REV. 913 (2004).

127. *See Freeman*, 924 So.2d at 57.

128. *Id.* at 52.

129. *Id.* at 56-57 (citations and quotations omitted).

130. *See* Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707, 715-16 (1981) ("[T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.").

understands full well that Florida's offered accommodation would not really fix the problem. Here is how it concludes the case:

> We recognize the tension created as a result of choosing between following the dictates of one's religion and the mandates of secular law. However, as long as the laws are neutral and generally applicable to the citizenry, they must be obeyed.[131]

This first sentence, of course, simply contradicts the no-burden finding. The court now sees quite clearly what it could not see earlier—that Freeman cannot both follow the law and the dictates of her religion. But the really startling thing is the second sentence. The Florida RFRA was passed to replace the *Smith* standard—to give religious observers protection even against laws that were neutral and generally applicable. The Florida legislature believed so.[132] The RFRA it passed said so.[133] The Florida Supreme Court held so.[134] But the court here ignores all of that. It boldly takes its language about neutrality and general applicability right out of the *Smith* opinion.[135]

And Florida's law, by the way, was hardly generally applicable. In interrogatories, Florida admitted to exempting more than 800,000 people from the photograph requirement. It issued temporary driving permits without photographs. It let citizens of other states and countries drive in Florida without a photo license. It issued permanent licenses without photographs to those in the military, those currently out of state, those who could not show up for medical reasons, and those who wanted to renew their license on a day the camera was broken.[136] Florida could exempt all those people from having any photo at all, but it could not let Sultaana Freeman wear the niqab in hers.

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131. *Freeman*, 924 So.2d at 57.

132. *See* FLA. STAT. ANN. § 761.01 (West 2005) ("WHEREAS, it is the intent of the Legislature of the State of Florida to establish the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963), and Wisconsin v. Yoder, 406 U.S. 205, (1972), to guarantee its application in all cases where free exercise of religion is substantially burdened . . . .") (quoting the Preamble to 1998, Fla. Laws 3296-97).

133. *See id.* § 761.03 (1) (West 2005) ("The government shall not substantially burden a person's exercise of religion, *even if the burden results from a rule of general applicability*, except that government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person[.]") (emphasis added).

134.

> [T]he FRFRA expands the free exercise right as construed by the Supreme Court in *Smith* because it reinstates the Court's pre- *Smith* holdings by applying the compelling interest test to neutral laws of general application . . . Thus, the FRFRA is necessarily broader than United States Supreme Court precedent, which holds that the "right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."

Warner v. City of Boca Raton, 887 So.2d 1023, 1032 (Fla. 2004) (quoting Employment Div. v. Smith, 494 U.S. 872, 879 (1990)).

135. *See Smith*, 494 U.S. at 879 (holding that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability'").

136. All of this came from interrogatory responses and deposition testimony by Florida's representatives. *See* Plaintiff's Response to Defendant's Motion for Partial Summary Judgment at 4-5, Freeman v. State of Florida, (No. CIO-02-2828) (Fla. Cir. Ct., June 6, 2003), 2003 WL 25884233.

E. NOTICE AND EXHAUSTION PROVISIONS UNDER STATE RFRAS

Having looked at how state RFRAs are interpreted generally, we should add the ways in which certain state RFRAs create additional obstacles for religious claimants. Consider notice and exhaustion provisions. Of the sixteen states with state RFRAs, three have some sort of process that must be exhausted before filing suit, thus allowing offending governments an opportunity to fix problems before litigation.[137] Sensible in theory, these requirements have caused problems for some unaware plaintiffs. Again the problem may be that attorneys with general practices have little experience in this area. Because neither the Free Exercise Clause nor the federal RFRA has any exhaustion provision, attorneys may be used to simply filing complaints and dealing with details later. But this has led even promising religious liberty claims to get barred. Maybe the most prominent example was *Webb v. City of Philadelphia.*[138] Kimberlie Webb was a practicing Muslim and police officer for the City of Philadelphia, who wanted to wear a Muslim veil while at work. The City refused, even though they allowed other officers to wear headscarves for other reasons—even, apparently, just for fashion's sake.[139] But Webb failed to exhaust the notice and exhaustion provisions of Pennsylvania's RFRA.[140] So instead of being analyzed under the compelling-interest standard of Pennsylvania's RFRA, Webb's claim was analyzed under Title VII's deferential religious-accommodation standard. Instead of asking whether Philadelphia had a compelling interest in denying her the veil, the Third Circuit asked only whether the cost on Philadelphia would be "more than [] de minimis."[141] Webb might have lost this case anyway, of course. So we cannot really gauge the impact of the notice provision, but surely

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137. 71 PA. STAT. ANN. § 2405(B) (West 2009) (barring a person from generally bringing a state RFRA "unless, at least 30 days prior to bringing the action, the person gives written notice to the [state] agency" providing certain information about the potential claim); TEX. CIV. PRAC. & REM. CODE ANN. § 110.006(a) (Vernon 2009) (barring a person from generally brining a state RFRA claim "unless, 60 days before bringing the action, the person gives written notice to the government agency" providing certain information about the potential claim); UTAH CODE ANN. § 63L-5-302(1) (2008) ("A person may not bring an action under [Utah's state RFRA] unless, 60 days before bringing the action, the person sends written notice of the intent to bring an action.").

138. 562 F.3d 256 (3d Cir. 2009).

139. *Id.* at 258 n.1 (noting that while Directive #78 of the Police Department's protocols allowed certain scarves, the Police Department interpreted it to bar the khimar); *id.* at 262 n.5 (noting that Directive #78 allows "scarves" when they are "black or navy blue").

140. *Id.* at 259 ("The District Court granted summary judgment on all claims, finding Webb . . . failed to meet the statutory notice requirements for the RFPA [Pennsylvania's state RFRA] claim[.]"). Webb also failed to timely bring her constitutional claims against the City of Philadelphia and forfeited those as well. *See id.* at 263-64 ("Neither Webb's first complaint nor her amended complaint presents a constitutional claim; nor was a constitutional claim raised before the District Court . . . We do not reach the merits of Webb's constitutional claims.").

141. *Id.* at 259-60 (noting that "Title VII religious discrimination claims often revolve around the question of whether the employer can show [that] reasonable accommodation would work an 'undue hardship'" and adding that "an accommodation constitutes an undue hardship if it would impose more than a de minimis cost on the employer") (citations and quotations omitted). The de minimis standard goes back to Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977), where the Court held that "[t]o require [employers] to bear more than a de minimis cost in order to [accommodate their employee's religious needs] is an undue hardship." *Id.* at 84.

it did not help.[142]

F. COVERAGE EXCLUSIONS UNDER STATE RFRAS

Another important difference among state RFRAs relates to coverage. Many state RFRAs have statutory exclusions—that is, areas carved out by statute where the state RFRA either does not apply or applies less forcefully.[143] Here states vary widely. Inmate claims, for example, are treated in a variety of ways. Oklahoma excludes challenges that would threaten the health and safety of inmates or others.[144] Texas says that prison interests must be treated as presumptively compelling under the compelling-interest standard, though that presumption is rebuttable.[145] Pennsylvania gets rid of the compelling-interest standard altogether for prisoner claims, saying that prison actions need only be "reasonably related to legitimate penological interests."[146] But of all the states, Virginia goes the furthest. Virginia statutorily defines the government so as simply not to include the Department of Corrections at all—thus simply writing inmates out of the protections of Virginia's RFRA.[147]

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142. For an example of a claim barred by the notice provisions of Texas's RFRA, see Cornerstone Christian Schools v. University Interscholastic League, No. SA-07-CA-139-FB, 2008 WL 2097477 (W.D. Tex. Apr. 1, 2008).

143. The federal RFRA, by contrast, has never had any coverage exclusions, although there was a last minute effort to exclude prisons from its scope which ultimately failed. *See* Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 191 (1995) ("[A] group of state attorneys general and prison administrators launched a last minute move to exclude prisons from RFRA.")

144.

> A state or local correctional facility's regulation must be considered in furtherance of a compelling state interest if the facility demonstrates that the religious activity: 1. Sought to be engaged by a prisoner is presumptively dangerous to the health or safety of that prisoner; or 2. Poses a direct threat to the health, safety, or security of other prisoners, correctional staff, or the public.

OKLA. STAT. ANN. tit. 51, § 254 (West 2008).

145.

> For purposes of [Texas's RFRA], an ordinance, rule, order, decision, or practice that applies to a person in the custody of a jail or other correctional facility operated by or under a contract with the department is presumed to be in furtherance of a compelling governmental interest and the least restrictive means of furthering that interest. The presumption may be rebutted.

TEX. GOV'T CODE ANN. § 493.024 (Vernon 2004); *see also* Balawajder v. Texas Dept. of Criminal Justice Institutional Div., 217 S.W.3d 20 (Tex. Ct. App. – 1st Dist. 2006) (holding that an inmate plaintiff had effectively rebutted this presumption and remanding for trial).

146.

> To the extent permitted under the Federal law, an agency shall be deemed not to have violated the provisions of this act if a rule, policy, action, omission or regulation of a correctional facility or its correctional employees is reasonably related to legitimate penological interests, including the deterrence of crime, the prudent use of institutional resources, the rehabilitation of prisoners or institutional security.

71 PA. CONS. STAT. ANN. § 2405(g) (West 2009).

147.

> Government entity' means any branch, department, agency, or instrumentality of state government, or any official or other person acting under color of state law, or any political subdivision of the Commonwealth and *does not include the Department of Corrections, the Department of Juvenile Justice, and any facility of the Department of Behavioral Health and Developmental Services that treats civilly committed sexually violent predators, or any local,*

These inmate exclusions have potentially broad implications. For now those implications are largely checked because of the Religious Land Use and Institutionalized Persons Act (RLUIPA), a federal law that reintroduces the compelling interest standard for state and local laws in the prison context.[148] States can exclude inmates from their own RFRAs, but RLUIPA still mandates the compelling-interest test regardless. But if RLUIPA were repealed or declared beyond Congress's power to enact,[149] these inmate exclusions would leave prisoners without a substantive right to practice their religion in many states. And because they negatively impact only the incarcerated, we can expect these coverage exclusions to go largely unnoticed outside prison walls.

States also have other idiosyncratic coverage exclusions—some significant, others less so. Oklahoma's RFRA explicitly says that it entitles no one to a same-sex marriage.[150] But that provision seems mostly symbolic, as it is hard to imagine a court ever interpreting a RFRA-like statute to give gay people the right to marry. Other coverage exclusions have greater practical effect. Florida, for example, excludes all drug-related claims from its RFRA.[151] Texas's RFRA forecloses religious exemptions to civil rights laws in some contexts.[152] The RFRAs of Pennsylvania and Missouri have a litany of coverage exclusions—no drug-law challenges, no challenges to health or safety laws, no challenges to the motor vehicle laws, no challenges to the laws regarding child support, child abuse, or child endangerment, no rights to physically injure others, and no rights to possess a weapon.[153]

Some of these exclusions make sense, but others can be problematic. Keep in mind how we live in a multiple-exemption regime, where religious people

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regional or federal correctional facility.

VA. CODE ANN. § 57-2.02(A) (2009) (emphasis added).

148. Religious Land Use and Institutionalized Persons Act, Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified at 42 U.S.C. §§ 2000cc (2000)).

149. In *Cutter v. Wilkinson*, 544 U.S. 709 (2005), the Supreme Court held that the part of RLUIPA dealing with institutionalized persons did not violate the Establishment Clause. *See id.* at 720 ("On its face, the Act qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause."). But the Supreme Court did not address the constitutionality of the land-use provisions or the issues of federal power, which remain open questions. For quite different views of RLUIPA, *compare* Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929 (2001), *with* Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311 (2003).

150. *See* OKLA. STAT. ANN. tit. 51, § 255 (West 2010) ("Nothing in this act shall be construed to . . . [a]uthorize same sex marriages, unions, or the equivalent thereof[.]").

151. *See* FLA. STAT. ANN. § 761.05(4) (West 2010) ("Nothing in this act shall be construed to circumvent the provisions of chapter 893 [Drug Abuse and Prevention Laws].").

152.

> [T]his chapter does not establish or eliminate a defense to a civil action or criminal prosecution under a federal or state civil rights law [although it is] fully applicable to claims regarding the employment, education, or volunteering of those who perform duties, such as spreading or teaching faith, performing devotional services, or internal governance, for a religious organization.

TEX. CIV. PRAC. & REM. CODE ANN. § 110.011 (Vernon 2005).

153. 71 PA. CONS. STAT. ANN. § 2406(B) (West 2009); MO. ANN. STAT. § 1.307(3) (West 2010).

often need exemptions from every level of government.[154] *Gonzales* may exempt the UDV from the federal laws prohibiting hoasca.[155] But the UDV still cannot use hoasca in Florida, even despite Florida's RFRA, because Florida criminalizes its possession[156] and excludes drug-related challenges from the protection of its RFRA.[157]

There seems to be little constitutional problem with these coverage exclusions. State RFRAs modify state laws. One can think of a state RFRA as simply amending every statute in a state's code simultaneously, specifying in each case that religious believers are exempt from the statute in question when it burdens their religious exercise without the necessary justification. Viewed this way, coverage exclusions create no real issue. Nothing stops Virginia from choosing to amend all of its laws except the prison-related ones. Nothing stops Texas from amending all of its laws except the civil-rights related ones. Certainly some coverage exclusions would be problematic. Virginia could not exclude Buddhists from its state RFRA; nor could it exclude Hispanics or Republicans. But as long as the coverage exclusion is unrelated to a protected class or activity, there should be no problem with it. *Smith* is the constitutional floor. States have the general power to raise it in the kinds of cases they choose. This conclusion holds also for the federal RFRA; Congress, if it chose, could craft exceptions to it. This also explains RLUIPA; there is nothing constitutionally troubling about the fact that Congress now protects religious observance in the areas of land use and institutionalized persons, but not in the area of home schooling. Writ large, states are free to design their RFRAs how they like, excluding or including whatever activities they feel appropriate.

G. THE PROBLEM OF POST-ENACTMENT COVERAGE EXCLUSIONS

But coverage exclusions can create other sorts of problems. One troubling issue relates to the power that states have to subsequently amend their state RFRAs. Always free to modify existing statutes, states can choose to later narrow the scope of their state RFRAs.[158] Consider events from Illinois.[159] Illinois passed its RFRA in 1998. Later on, it became interested in expanding Chicago's O'Hare airport. But two religious cemeteries objected. In 2003, Illinois passed the O'Hare Modernization Act, which covered a number of topics

154. *See supra* notes 54-58 and accompanying text (explaining this point).

155. *See generally* Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418 (2006).

156. *See* FLA. STAT. ANN. § 893.03(1)(c)(12) (West 2010) (listing dimethyltryptamine or DMT, the active ingredient in hoasca, as a prohibited Schedule I substance under Florida law).

157. *See* FLA. STAT. ANN. § 761.05 (West 2005).

158. Commentators have noted this point. *See* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1474-75 (1999) ("[S]tate RFRAs, being state statutes, can be modified by the legislature that enacted them" and "state RFRAs leave the final decision to legislative discretion."); Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 CARDOZO L. REV. 565, 567 (1999) ("[S]uch legislation nevertheless puts political branches in ultimate control of the subject.")

159. What follows, in the text above, comes from St. John's United Church of Christ v. City of Chicago, 502 F.3d 616 (7th Cir. 2007).

related to the airport expansion. But a crucial part of it was this language added to the state RFRA:

> 35/30. O'Hare Modernization
>
> § 30. O'Hare Modernization. Nothing in this Act limits the authority of the City of Chicago to exercise its powers under the O'Hare Modernization Act for the purposes of relocation of cemeteries or the graves located therein.[160]

Shortly after the Act passed, one of the religious cemeteries (St. John's) sued. St. John's argued that Section 30's modification of Illinois's state RFRA violated the federal Free Exercise Clause. The Seventh Circuit disagreed, concluding that Section 30 was neutral and generally applicable and thus legitimate under *Smith* and *Lukumi*. Considered in its entirety, the Court said, the Modernization Act aimed at destroying all obstacles in the way of the O'Hare project, religious and secular alike. If there had been 10 cemeteries in the way of the project, all secular, Illinois would have done precisely the same thing. For those reasons, the Court concluded that Section 30 was essentially religion-neutral—it treated religion exactly the way it would have treated everything else.

In his dissent, Judge Ripple pointed out difficulties with this analysis. The entire point of Section 30, he stressed, was to allow Chicago to take and destroy these cemeteries over religious objection. In that sense, it could hardly be neutral or generally applicable. Section 30 was not neutral; it was passed precisely to burden these two religious groups. And Section 30 was not generally applicable either; it applied to no one else.

This is a difficult problem. Consider it a specialized variant of the more general "take back" question: under what circumstances can government *take back* a religious exemption (or a possible religious exemption under a generalized statute like RFRA)? In *St. John's*, Illinois had given the religious cemeteries RFRA protection, and the question was whether Illinois could take it back. This is a remarkably undertheorized question in the law-and-religion field. Free Exercise Clause scholarship focuses on the circumstances in which exemptions can be given. It tends not to focus on the circumstances in which exemptions can be taken back.

Judge Ripple's position in *St. John's* makes a good deal of sense, but I do not think it can carry the day. The core problem with it is that it seems to mean government can never take back religious exemptions. Consider, for example, the federal statute that exempts the Native American religion from the peyote laws.[161] Now imagine a move to get rid of that exemption. If Judge Ripple is right, that exemption simply cannot be removed. It is a permanent part of the United States Code. For under Judge Ripple's view, any statute repealing it

160. 775 ILL. COMP. STAT. ANN. 35/30 (West 2009) (emphasis added).

161. *See* 42 U.S.C. § 1996a(b)(1) ("Notwithstanding any other provision of law, the use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion is lawful, and shall not be prohibited by the United States or any State.").

would violate the Free Exercise Clause. It could not be neutral, because its objective would be to make it harder on adherents of the Native American religion. It could not be generally applicable, because it would apply only to them. The government could argue about secondary purposes or motives—it could stress the secular objectives it might be trying to accomplish by restricting Native American religious peyote use. But that would not change anything. The Free Exercise Clause bars government from singling out religion. Absent some truly compelling interest, it does not permit government to do so simply because it has secondary purposes in mind.[162]

Under Judge Ripple's model, legislative exemptions become fixed and unalterable. That, standing alone, might be fine; the *Sherbert/Yoder* regime was also a fixed and unalterable one. But here it would create some very bad incentives. Once legislatures become aware that they cannot revoke religious exemptions, they will hesitate to ever give them. They will be particularly reluctant to give controversial religious exemptions and would never give across-the-board ones like state RFRAs. As a result then, we should have very limited judicial review over revocations of religious exemptions. The answer, I believe, must be this: legislatures should be as free to revoke religious exemptions as they are to deny them in the first instance. A religious group should only be able to challenge the revocation of a religious exemption on the same terms that it can challenge its outright denial.

Yet this can create problems which we should rightly fear. Legislatures may abuse their power to take back religious exemptions. Consider what happened in the *Freeman* case. *Freeman*, again, involved a Muslim woman who sought to wear a veil on her state driver's license.[163] She brought claims under Florida's state RFRA. But midway through the litigation, Florida amended its RFRA in a way that excluded coverage for Freeman's claim: "Notwithstanding chapter 761 or s. 761.05 [Florida's RFRA], the requirement for a fullface photograph or digital image of the identification card holder may not be waived."[164] This is a very troubling aspect of legislative codification. Because states are free to amend their state RFRAs, they have the power to exclude unpopular claims—and unpopular people—from coverage. We have gotten lucky so far. *St. John's* and *Freeman* are the only two examples I know of where state RFRAs have been modified after enactment.[165] But this can change. And if we get to the point where states routinely cut back on their RFRAs in order to deprive unpopular claims of protection, religious minorities may find state RFRAs almost useless. Also note that the two examples we have of state

162. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524 (1993) (holding that "the principle of general applicability was violated because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs").

163. *See supra* notes 126-136 and accompanying text (discussing *Freeman*); *see also* Freeman v. Department of Highway Safety and Motor Vehicles, 924 So.2d 48 (Fla. Dist. Ct. App. 2006).

164. *Freeman*, 924 So.2d at 50-51 n.2 (quoting FLA. STAT. ANN. § 322.142(1) (West 2010)). The Court found it unnecessary to reach the effectiveness of this amendment; it said it would rule against Freeman either way. *Id.* at 51 n.2.

165. Thanks to Douglas Laycock and Marc Stern for pointing this out to me in correspondence.

RFRAs being modified after enactment have been examples of where their protection has been cut back. We have no instances of state RFRAs being broadened to expand protection. There have been a lot of judicial losses under state RFRAs—many more losses than wins. It is telling that none of the losses have been changed by legislation.[166]

Recognizing the potential unfairness that can arise in these situations, we could try to think of some fix that might aid the particular plaintiff in *Freeman* but still allow states flexibility over their state RFRAs. For example, we could insist that when states narrow their RFRAs, they do so only prospectively. But it is hard to see where such a requirement would come from—the federal constitution generally allows states to change their laws retroactively, as Florida did in *Freeman*.[167] One could try to reconfigure the idea of religious neutrality in a way that might bar what Florida did. One could say that the problem with *Freeman* is that Florida did to Muslims what it would not do to Christians. But the truth of that claim is not beyond doubt and it is probably impossible to prove to judicial satisfaction. Ultimately, this is a problem that goes back to *Smith*. Religious exemptions are now a matter of legislative grace. That grace can be bestowed, denied, or bestowed and then revoked. Changing that requires revisiting *Smith*.

IV. CONCLUSION

Twenty years after it was handed down, *Smith*'s legacy remains unclear. *Smith* set in motion a chain of events that have not yet come to an end. At the federal level, religious observers now have hope in RFRA and *Gonzales*. But the future of religious freedom really rests with the states, and things there seem even less clear.

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166. Eugene Volokh, writing before either *Freeman* or *St. John's*, noted that this would be an interesting empirical question and indeed it is. *See* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1476 (1999) ("When the legislature concludes that a court was too stingy with exemptions from some statute, it will enact an explicit religious exemption. When the legislature concludes that a court was too generous, it will specifically provide that the statute has no exemption."); *see also id.* at 1475 n.24 ("[I]t would be interesting to know how often legislators in fact override judicial rulings under state RFRAs, and how effective the argument that 'you shouldn't tamper with this important statute' is in fighting such moves. State RFRAs are, however, too new for any empirical inquiry into these questions.").

167. *See* Landgraf v. USI Film Products, 511 U.S. 244, 267 (1994) ("The Constitution's restrictions, of course, are of limited scope. Absent a violation of one of those specific provisions, the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope.")

A retroactive withdrawal of RFRA coverage in a criminal case would look differently—it would violate the Constitution's prohibition of Ex Post Facto laws. *See, e.g.*, Collins v. Youngblood, 497 U.S. 37, 49 (1990) ("A law that abolishes an affirmative defense of justification or excuse contravenes [the Ex Post Facto prohibition] because it expands the scope of a criminal prohibition after the act is done."); Beazell v. Ohio, 269 U.S. 167, 169-170 (1925) ("It is settled, by decisions of this court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, *or which deprives one charged with crime of any defense available according to law at the time when the act was committed*, is prohibited as ex post facto.") (emphasis added).

The question becomes what to do. To me, the kitchen-sink approach makes the most sense; advocates for religious freedom should do what they can at every level to restore religious freedom. At an opportune time, we should press for a revisiting of *Smith* and *Boerne*; we should also push in Congress for a new version of the Religious Liberty Protection Act. Any federal floor for Free Exercise that goes beyond *Smith* would be a good thing.

At the state level, we should work to continue the state RFRA movement.[168] Sixteen states have state RFRAs, but some very key states—California, New York, Ohio, and Michigan—do not.[169] We also need to care for state RFRAs after their passage, perhaps with an educational campaign of Continuing Legal Education classes for attorneys and judges. Hopefully, over time, attorneys will realize the value of these overlooked provisions. And hopefully, over time, the worst judicial misinterpretations will be corrected. Another possibility lies in state constitutional provisions relating to religious liberty. I worry about whether those provisions really have much effect, but others have seen cause for optimism.[170] None of these bullets will be magic, but we should strive to do the best we can.

Finally and most importantly, we must work harder to convince people why religious liberty is worth protecting. Without that understanding, legislators will never vote for RFRAs. Without that understanding, judges will hesitate to interpret them fairly. Without that understanding, religious liberty will soon become a second class right, relegated to theory and to memory. We should fight that at all costs.[171]

168. *See, e.g.*, H.B. 440, 2010 Leg., Reg. Sess. (Ky. 2010) (a proposed Kentucky RFRA).

169. *See supra* notes 80-81 and accompanying text.

170. *See, e.g.*, Piero A. Tozzi, *Whither Free Exercise:* Employment Division v. Smith *and the Rebirth of State Constitutional Free Exercise Clause Jurisprudence?*, 48 J. CATH. LEGAL STUD. 269 (2009); Christine M. Durham, *What Goes Around Comes Around: The New Relevancy of State Constitution Religion Clauses*, 38 VAL. U. L. REV. 353 (2004); Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-*Smith *Jurisprudence*, 1993 BYU L. REV. 275.

171. In my judgment, the best piece working toward that understanding is Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313 (1996).